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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 36

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
APPELLANT,

vs.

PAUL A. McGINLEY, DISTRICT ATTORNEY,
COUNTY OF LEHIGH, PENNSYLVANIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED FEBRUARY 12, 1960
PROBABLE JURISDICTION NOTED APRIL 25, 1960

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

TWO GUYS FROM HARRISON-ALLENTOWN, INC.

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania

---

COMPLAINT—Filed November 22, 1958

1. Plaintiff is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania engaged in operating a store in Whitehall Township, Lehigh County, Pennsylvania, employing approximately 300 persons.

2. The defendant is the District Attorney for the County of Lehigh, Pennsylvania, having his office at 445 Hamilton Street, Allentown, Pennsylvania.

3. Jurisdiction of this Court is invoked under 28 U.S.C. 1331, 1343, 42 U.S.C. 1981 and 28 U.S.C. 2281, 2284.

4. The amount in controversy exceeds $10,000, exclusive of interest and costs, and the controversy arises under the Constitution of the United States and 42 U.S.C. 1983 (Civil Rights Act) and is to redress the deprivation under color of state law of a right secured under the Constitution.

5. The defendant is arbitrarily and discriminatorily endeavoring to coerce plaintiff to discontinue the operation of its business on Sunday by threatening to arrest its employes for alleged violation of the so-called Pennsylvania Sunday Blue Laws and for conspiracy to violate said laws. The said District Attorney, despite repeated requests, has [fol. 2] refused to enforce said laws against other persons

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engaged in business and worldly employment on Sunday in the aforesaid county.

6. The Pennsylvania Sunday Blue Laws violate the Fourteenth Amendment to the Constitution of the United States because (a) it constitutes unreasonable discrimination and (b) it is a law respecting the establishment of religion.

7. The defendant has threatened that if the plaintiff attempts to operate its store on this Sunday, November 23, 1958, he will cause the arrest of employes thereof both for violating the Blue Laws and for conspiracy to violate the Blue Laws, the second of which offenses is punishable by imprisonment not exceeding two years. The result of such threats which have been publicly announced by the District Attorney is to intimidate the employes of plaintiff who will thereby be coerced not to work, thus requiring plaintiff to close its store.

8. A substantial part of plaintiff's business is derived from its operation on Sunday and if it is prevented from continuing its operation on Sunday, plaintiff will suffer substantial and irreparable injury. The said action of the District Attorney is also in violation of the rights of the aforesaid employes under the Constitution of the United States.

9. Because of the District Attorney's action threatened against the employes, no plain, adequate or complete remedy exists to redress the threatened injury other than this action for injunction.

Wherefore, plaintiff respectfully prays that:

1. The Court convene a three-judge District Court as required by 28 U.S.C. 2281 and 2284.

[fol. 3] 2. The Court enter judgment declaring the action of the District Attorney complained of to be unconstitutional and that the statute as enforced by him is unconstitutional.

3. The Court enter an injunction, preliminary until hearing and permanent thereafter, restraining the said defendant from threatening to arrest or arresting plaintiff's

employes for alleged violations of the Blue Laws or for conspiracy to violate said laws.

4. Pending hearing of the aforesaid application for injunction, a temporary restraining order be issued to prevent irreparable damage, restraining the District Attorney from threatening to arrest or arresting plaintiff's employes for alleged violations of the Blue Laws or for conspiracy to violate said laws.

5. Such other relief be granted as to the Court shall appear proper.

Harold E. Kohn, 123 South Broad Street, Philadelphia 9, Pennsylvania;

Oscar Brown, 1700 Bankers Securities Bldg., Philadelphia 7, Pennsylvania;

Attorneys for Plaintiff.

Of Counsel:

Morris Efron, George J. Joseph, Allentown, Pennsylvania.

[fol. 4]

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

Morris Efron, being duly sworn according to law, deposes and states that he is of counsel for plaintiff in the foregoing action; that he is informed of the facts set forth in the complaint; that he is authorized to and does take this affidavit on behalf of plaintiff; that the facts set forth in the foregoing complaint are true and correct to the best of his knowledge, information and belief; that if the relief by way of temporary restraining order which is requested in the complaint is not granted, plaintiff and its employes will suffer serious and irreparable harm because approximately 25% of its business is done on Sunday.

Morris Efron

Sworn to and subscribed before me this 21st day of November, A.D., 1958.

[Signature Illegible], Notary Public.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

[Title omitted]

ORDER CONVENING THREE-JUDGE COURT, ETC.—
November 22, 1958

And Now, to wit, this 22d day of November, 1958, upon consideration of the complaint and affidavit filed herein, and it appearing that substantial and irreparable injury will be suffered by plaintiff if the relief prayed for is not granted, it is Ordered, Adjudged and Decreed as follows:

1. A three-judge court shall be convened pursuant to 28 U.S.C. sec. 2284;

2. Pending the convening of said court and the issuance of its order, or until further order of this court, the defendant is hereby temporarily restrained from arresting or threatening to arrest any employe of plaintiff for violating the Pennsylvania Sunday Blue Laws, Pennsylvania Act of 1939, P. L. 872, sec. 699.4, 18 Purd. Stat. sec. 4699.4, or for conspiracy to violate the same;

3. Further hearing shall be had on plaintiff's application for preliminary injunction on November 25, 1958, at 11 o'clock A. M. in the United States Court House, 9th and Chestnut Streets, Philadelphia 7, Pennsylvania.

Geo. A. Welsh, U.S.D.J.

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

AMENDED COMPLAINT—Filed September 4, 1959

1. Plaintiff is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania engaged in operating a store in Whitehall Township, Lehigh County, Pennsylvania, employing approximately 300 persons.

2. The defendant is the District Attorney for the County of Lehigh, Pennsylvania, having his office at 445 Hamilton Street, Allentown, Pennsylvania.

3. Jurisdiction of this Court is invoked under 28 U.S.C. 1331, 1343, 42 U.S.C. 1981 and 28 U.S.C. 2281, 2284.

4. The amount in controversy exceeds $10,000, exclusive of interest and costs, and the controversy arises under the Constitution of the United States and 42 U.S.C. 1983 (Civil Rights Act) and is to redress the deprivation under color of state law of a right secured under the Constitution.

5. The defendant is arbitrarily and discriminatorily endeavoring to coerce plaintiff to discontinue the operation of its business on Sunday by threatening to arrest its employes for alleged violation of the so-called Pennsylvania Sunday Blue Laws (including the amendatory act of August 10, 1959) and for conspiracy to violate said laws. The said District Attorney, despite repeated requests, has refused to enforce said laws against other persons engaged in business and worldly employment on Sunday in the aforesaid county.

[fol. 7] 6. The Pennsylvania Sunday Blue Laws violate the Fourteenth Amendment to the Constitution of the United States because (a) it constitutes unreasonable discrimination and (b) it is a law respecting the establishment of religion.

7. Shortly prior to the commencement of this action and for some time prior thereto, the defendant had threatened that if the plaintiff attempted to operate its store on Sunday, including Sunday, November 23, 1958, he would cause the arrest of employes thereof, both for violating the Blue Laws and for conspiracy to violate the Blue Laws, the second of which offenses is punishable by imprisonment not exceeding two years. Defendant has continued such threats and has specifically threatened that if the plaintiff attempts to operate its store on Sunday, September 13, 1959, he will cause the arrest of employes thereof and subject them to the penalties provided by the amendatory act of August 10, 1959. The result of such threats which have been publicly announced by the District Attorney is to intimidate the employes of plaintiff who will thereby be coerced not to work, thus requiring plaintiff to close its store.

8. A substantial part of plaintiff's business is derived from its operation on Sunday and if it is prevented from continuing its operation on Sunday, plaintiff will suffer substantial and irreparable injury. The said action of the District Attorney is also in violation of the rights of the aforesaid employes under the Constitution of the United States.

9. Because of the District Attorney's action threatened against the employes, no plain, adequate or complete remedy exists to redress the threatened injury other than this action for injunction.

Wherefore, plaintiff respectfully prays that:

1. The Court convene a three-judge District Court as required by 28 U.S.C. 2281 and 2284.

[fol. 8] 2. The Court enter judgment declaring the action of the District Attorney complained of to be unconstitutional and that the statute as enforced by him is unconstitutional.

3. The Court enter an injunction preliminary until hearing and permanent thereafter, restraining the said defendant from threatening to arrest or arresting plaintiff's employes for alleged violations of the Blue Laws or for conspiracy to violate said laws.

4. Pending hearing of the aforesaid application for injunction, a temporary restraining order be issued to prevent irreparable damage, restraining the District Attorney from threatening to arrest or arresting plaintiff's employes for alleged violations of the Blue Laws or for conspiracy to violate said laws.

5. Such other relief be granted as to the Court shall appear proper.

Harold E. Kohn, Attorney for Plaintiff, 123 South Broad Street, Philadelphia 9, Pennsylvania.

Of Counsel:

Oscar Brown, 1700 Bankers Securities Building, Philadelphia 7, Pennsylvania;

Morris Efron, 502 Turner Street, Allentown, Pennsylvania.

[fol. 9]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

MOTION FOR CLARIFICATION OF ORDER FILED NOVEMBER 22, 1958, OR IN THE ALTERNATIVE, FOR TEMPORARY RESTRAINING ORDER—Filed September 4, 1959

Plaintiff, by its attorneys, respectfully moves the Court:

1. For an order clarifying the order filed November 22, 1958 in these proceedings by declaring paragraph 2 to include within the Sunday Blue Laws under the Act of 1939 there referred to, the amendment to said act adopted August 10, 1959.

2. In the alternative, for an order restraining defendant, pending final order of this Court, from arresting or threatening to arrest any employe of plaintiff for violating the

Pennsylvania Sunday Blue Laws, Pennsylvania Act of 1939, P. L. 872, Sec. 699.4, 18 Purd. Stat. 4699.4, and any amendment thereto, including the amendment adopted by the Act of August 10, 1959, or for conspiracy to violate the same.

Harold E. Kohn, Attorney for Plaintiff, 123 South Broad Street, Philadelphia 9, Pennsylvania.

Of Counsel

Oscar Brown, 1700 Bankers Securities Building, Philadelphia 7, Pennsylvania;

Morris Efron, 502 Turner Street, Allentown, Pennsylvania.

[fol. 10] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed September 11, 1959

First Defense

Insofar as plaintiff's complaint attacks the constitutionality of the Pennsylvania Sunday laws, it fails to state a claim upon which relief can be granted.

Second Defense

1. The averments of paragraph 1 of plaintiff's complaint are admitted.

2. Admitted

3. Admitted

4. Admitted

5. Defendant admits that he has threatened to arrest employees of plaintiff for violations of the Pennsylvania Sunday laws and for conspiracy to violate said laws. He denies that he has any present intention to make any arrests for conspiracy. He denies that he is arbitrarily and [fol. 11] discriminatorily endeavoring to coerce plaintiff to discontinue the operation of its business on Sunday. He denies that he has refused to enforce said laws against other persons engaged in business and worldly employment on Sunday in Lehigh County.

6. a. Denied

b. Denied

7. Defendant admits that prior to the commencement of this action he threatened to cause the arrest of plaintiff's employees for violating the Pennsylvania Sunday laws and for conspiracy to violate said laws if plaintiff operated its store on Sunday, including Sunday, November 23, 1958. He admits that he has threatened to cause the arrest of plaintiff's employees for violating such of said laws as he has not been restrained from enforcing and to subject them to the penalties provided by the Act of August 10, 1959, Act No. 212, 1959 Session of the General Assembly of Pennsylvania if plaintiff operates its store on Sunday, September 13, 1959. He denies that he will arrest them for conspiracy to violate said laws if plaintiff operates its store on Sunday, September 13, 1959. He denies that the result of his actions has been to intimidate the employees of plaintiff so that they will be coerced not to work and thus require plaintiff to close its store.

8. Defendant is without sufficient knowledge or information to form a belief whether a substantial part of plaintiff's business is derived from its operation on Sunday and whether plaintiff will suffer substantial and irreparable injury if it is prevented from continuing its operation on [fol. 12] Sunday. Defendant denies that his action is in violation of the rights of plaintiff's employees.

9. Admitted

Wherefore, defendant demands that plaintiff's complaint be dismissed with costs to plaintiff.

Ernest F. Ritter, Assistant District Attorney of Lehigh County;

Harry J. Rubin, Attorney, Pennsylvania Department of Justice;

Anne X. Alpern, Attorney General, Commonwealth of Pennsylvania;

Attorneys for Defendant.

Department of Justice, Commonwealth of Pennsylvania, Main Capitol Building, Harrisburg, Pennsylvania.

[fol. 13]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

Present: Hastie, Circuit Judge; and Welsh and Lord, District Judges.

ORDER GRANTING TEMPORARY INJUNCTION—
September 11, 1959

And Now, to wit, this 11th day of September, 1959, upon consideration of the record herein and after hearing counsel and it appearing that substantial and irreparable injury will be suffered by plaintiff because plaintiff will be required to discontinue the operation of its store on Sundays, the day of its largest sales volume, if the relief provided herein is not granted, It Is Ordered, Adjudged and Decreed as follows:

Until further order of this Court, the defendant is hereby temporarily restrained from arresting or threatening to arrest any employee of plaintiff for violating the Pennsylvania Act of August 10, 1959, "Amending the act of

June 24, 1939 (P. L. 872) entitled 'An act to consolidate amend and revise the penal laws of the Commonwealth' prohibiting certain business activities on Sunday."

By the Court:

William H. Hastie, Circuit Judge.

[fol. 14]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

TWO GUYS FROM HARRISON-ALLENTOWN, INC.

—vs.—

PAUL A. MCGINLEY, District Attorney,
County of Lehigh, Pennsylvania.

Transcript of Hearing—September 11, 1959

Philadelphia, Pa.,
September 11, 1959

Before: Hon. William H. Hastie, Circuit Judge, Hon. George A. Welsh, and Hon. John W. Lord, Jr., District Judges.

APPEARANCES:

Present: Dilworth, Paxson, Kalish, Kohn & Dilks, by Harold E. Kohn, Esq., and William T. Coleman, Jr., Esq., and Oscar Brown, Esq., and Morris Efron, Esq., representing plaintiff.

Paul A. McGinley, Esq., District Attorney of Lehigh County, and Ernest F. Ritter, Esq., First Assistant District Attorney, representing defendant.

[fol. 15] Harry J. Rubin, Esq., Deputy Attorney General, representing Commonwealth of Pennsylvania.

Morgan, Lewis & Bockius, by Arthur Littleton, Esq., and W. James MacIntosh, Esq., representing Pennsylvania Retailers' Association.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Hastie: In the case of Two Guys from Harrison v. McGinley, are the counsel on both sides ready?

Mr. Rubin: Yes, sir.

Mr. Kohn: Yes, sir.

Judge Hastie: It is the understanding of the Court that the matter before us, and the only matter before us today, is a motion on the part of the plaintiff seeking either a construction of a present restraining order or an additional restraining order applicable to the new Statute. Is that a part of counsel's understanding of our procedural position?

Mr. Kohn: Yes, sir.

Judge Hastie: I assume that the plaintiff wishes to present evidence, but you may indicate how you wish to proceed, Mr. Kohn.

Mr. Littleton: Excuse me, Your Honor.

Judge Hastie: I am sorry, Mr. Littleton.

MOTION FOR LEAVE TO INTERVENE

Mr. Littleton: I am here, if the Court pleases, represent-[fol. 16] ing the Pennsylvania Retailers' Association, which is a Pennsylvania corporation. The membership consists of hundreds of owners of retail establishments or the officers of corporations which are owners of retail establishments, every one of which will be affected and materially affected by any decision which is made in this case, even a decision on the narrow issue which Your Honor just stated.

I therefore would like to move at this point to be allowed to intervene and come on the record, for the reason that the legal situation which we find ourselves being prepared and willing and anxious to obey the law as it is, we will be prejudiced or not prejudiced depending upon the outcome of this hearing; wherefore, I would like to present our motion for leave to intervene at this time, both as a matter of right—

Judge Hastie: Excuse me, Mr. Littleton.

Is there objection, Mr. Kohn?

Mr. Kohn: Yes, there is, for two reasons: One, this motion was served on us yesterday afternoon about three or four o'clock; I have hardly had a chance really to consider it, and my present inclination is to believe that they have no right to intervene, because no right of theirs is being adversely affected here. I take it these people want to intervene on the part of the defendant, and if they want to observe Sunday closing, there is nothing here which will [fol. 17] prevent them from closing on Sunday, but, aside from that, I would like a reasonable period to consider this and to file an answer.

Judge Hastie: I assume you are not pressing the Court to act immediately upon it.

Mr. Littleton: No.

Judge Hastie: We will be glad to have you remain, of course. I assume you had not anticipated offering evidence or anything of that sort.

Mr. Littleton: I am not going to offer any evidence at all, sir, I would simply like to present my motion for leave to intervene. I would like to intervene. We will be affected, as I say. I do not agree with Mr. Kohn in that, because if we remain closed, as we intend to remain closed, because that is the law, we will be disadvantaged if Mr. Kohn's client is allowed to remain open.

Judge Hastie: Well, your motion will be received and the Court will act promptly upon it.

Mr. Littleton: I should like the privilege of filing a brief also.

Judge Hastie: You mean a brief on the merits of the controversy or a brief in support of your request to intervene?

Mr. Littleton: You see, with my motion for intervention, [fol. 18] I am filing an answer as is required, and the brief would be in support of what I say in the answer.

Mr. Kohn: Well, if Your Honors please, I think Mr. Littleton is just a trifle ahead of himself. I think we should have a chance to answer the allegation alleged by him in support of the motion to intervene, we should have a chance to argue it, otherwise we are met, in a sense, by a fait ac-

compli—he is in, he has presented his brief, he has done his arguing—and since this was served on us only last night, and actually we don't even know who are the members of, whatever the name is, the Retail Merchants Association.

Judge Hastie: When would you be in position to file any written objection which you may have, Mr. Kohn?

Mr. Kohn: I should say by Tuesday of next week.

Judge Hastie: By Tuesday of next week.

Very well. You will submit your motion and the supporting papers, and, Mr. Kohn, you may file whatever objections you have, and we will consider the two things together.

Mr. Kohn: By that time, if we could have a gentlemen's understanding, I would like to know the members of this Association and to have a copy of its charter and by-laws, so that we know what we are dealing with, because ap- [fol. 19] parently this organization operates no store.

Judge Hastie: I assume that you would have no objection to giving Mr. Kohn that information?

Mr. Littleton: Not the slightest.

Judge Hastie: Mr. Littleton, one other thing, this brief that you are referring to, has that also been filed?

Mr. Littleton: No, sir.

Judge Hastie: You are holding that?

Mr. Littleton: No, I will file that.

OPENING STATEMENT ON BEHALF OF PLAINTIFF BY MR. KOHN

Mr. Kohn: If Your Honors please, perhaps a brief statement at the beginning, which counsel for the defendant may wish to answer, may obviate the necessity of a certain amount of testimony in this case. We are here, after all, only for preliminary relief for a relatively short period of time I take it.

I think at this stage we can hardly deny that there is a substantial issue being raised here. Regardless of what the outcome would be I think reasonable men at this stage would agree that at least we have a reasonable chance of having the Sunday Blue Laws, including the recent amendment, upset, as laws respecting religion and as discriminatory, wholly aside from what the particular District Attorney

in Lehigh County may have done and the reasons why he may have done it.

[fol. 20] When this matter was first started there was no decision, such as there now is, by a very learned and respected Court, three-judge court, two members of which were Court of Appeals judges, Judge Magruder and Judge Woodbury.

I think now the Commonwealth of Pennsylvania, by the recent amendment, which is the subject of the motion before Your Honors today, has put its statutory plan for Sunday enforcement as closely on all fours with what there was before the three-judge court in Massachusetts as any legislature could possibly do.

They have now not only discriminated as between certain commercial activities of one kind or another, that is, by that I mean selling, manufacturing or sports, they now have carved out a set of activities consisting of retail selling for which we have the rather unusual and extraordinary penalty in the sense of a hundred or two hundred dollars or a prison sentence in default for each sale or each offer to sell, a fine which could and would, if the District Attorney proceeds with his announced plan, in the case of this plaintiff amount to a quarter to a half a million dollars for one Sunday's activities.

We see that we have a statute which says if you buy, as I pointed out, a pair of slipcovers for your home the fellow who sells them to you or unsuccessfully offers to sell them [fol. 21] to you is subject to a $200 fine. If you want to buy slipcovers for your automobile, for your automobile seat, it is $4 for the entire day's business. I think that merely typifies one kind of discriminatory activity.

Now, I think for a long time any candid observer who read the Blue Laws in Pennsylvania would have had to conclude that they were laws which respected religion. I mean just the very wording, the nature of the statute, even the briefest analysis of the historical background of the statute, even, as a matter of fact, the District Attorney's own brief in the Quarter Sessions and Superior Courts of Pennsylvania, where he referred to the fact that Christianity is part of the common law of the Commonwealth of Pennsylvania, as a reason in support of the constitutional-

ity of this legislation, but it was, in a sense, like the emperor's new suit. You remember that fairy tale where the emperor was theoretically clothed by his new tailor in a beautiful new suit; although, of course, he had completely misled him and had given him nothing, but nobody had courage enough to say, the emperor is naked, as he rode down the street, until some little boy pointed out that the emperor was naked, and then everybody realized it.

Now you have the three-judge court in Massachusetts stating very clearly, I think, and beyond any possible con- [fol. 22] travention, that the statute is a law which has its origin in and which in a sense establishes certain tenets of the Christian religion as part of the secular law of the Commonwealth.

So, as I say, I think we certainly cannot quarrel with the proposition that there is a reasonable chance of recovery for the plaintiff here, certainly a substantial chance.

We have the fact that this matter was before the Court of Appeals in this Circuit, and while they did not pass upon the arguments raised specifically with regard to whether or not the law was constitutional, or there was a substantial issue raised, they did vacate the order which held that there was no substantial question, and ordered the convening of a three-judge court. I think it has a certain significance. The ground upon which the decision was rendered was one not argued by the parties, but I think the whole thing must be considered in a practical light.

We have the fact that three-judge courts are being requested. As a matter of fact, there is another hearing at 11 o'clock today with regard to the enforcement of the ordinance as against the Philadelphia authorities—the District Attorney, the Commissioner of Police. The City Solicitor, I note from this morning's paper, has indicated [fol. 23] that he will at 11 o'clock unveil the City's position, but I think it is no secret, from reading the newspaper comments which have preceded, that there will be in all likelihood no official enforcement of this law in Philadelphia, one of the major counties, of course, in this state.

District attorneys in other counties have indicated that they too will refrain from enforcement—the District Attorneys in York and Lebanon Counties and in Montgomery County.

I think, as I indicated, that to some extent the district attorneys throughout the Commonwealth or other law enforcement officials are looking to what this Court does today, to avoid a certain amount of unnecessary litigation.

As a result of this matter being deferred from the conference in chambers last week until today I think we now have the suits which were started in Philadelphia. I think they contemplated that if an order were issued that would be sufficient for the situation in Philadelphia County.

So that I think we are in a situation where we will have an avoidable multiplicity of litigation in many three-judge courts throughout this Commonwealth if a restraining order is denied here.

Now, so far as the question of substantial irreparable injury is concerned, we can present proof, but I think it is [fol. 24] almost axiomatic that fines of this magnitude do constitute substantial irreparable harm. They are fines which obviously could put out of business any enterprise.

Judge Hastie: Let me see. If that is your irreparable injury, after all, in the action in which a fine is assessed, you could as well test the constitutionality as to this as far as that injury is concerned.

Mr. Kohn: Well, sir, the Courts have held, and I think probably as good, as clear and as concise a statement of the rule as possible is in the Morrison v. Davis case in the Fifth Circuit, which is cited in our printed brief in the Court of Appeals.

By the way, Your Honors do have those memorandums that I sent down?

Judge Hastie: Yes, the memorandums handed up today.

Mr. Kohn: No, I sent to the Court copies of the printed brief.

Judge Hastie: Oh, yes.

Mr. Kohn: Let me read, just briefly, one paragraph in the Morrison case.

The memorandum which I have given today is simply a number of additional cases. This principle is very well established.

[fol. 25] This was the case where a woman sought to enjoin the enforcement of an ordinance which provided a criminal penalty for bus drivers who required certain pas-

sengers to go to the rear of the bus, and this is what they say:

> Moreover, we think the trial court here properly held, it is not the court's view that in our civilization it is necessary to have incidents requiring arrests to have the rights of people declared. These plaintiffs are not being prosecuted—

and, incidentally, in our case too, as this point was discussed before the Court of Appeals, this plaintiff is not being prosecuted, it will only be this plaintiff's employees, and that is a traditional case for the granting of injunctive relief in a situation like this in both the state and the federal courts.

We have cited in the brief which you have there a number of cases, including the Sisters of the Holy Names case in the United States Supreme Court and other cases, where it was held that where the plaintiff is a corporation and its employees are subject to arrest, that the plaintiff a fortiori has a right to come into equity.

But let me continue with the reading:

> These plaintiffs are not being prosecuted, they have [fol. 26] not violated a state law; they are seriously affected by the provision of the statute which places a criminal penalty on the streetcar operators who permit them to travel on a streetcar without complying with the constitutional statute. They are asking relief from such constraint. Since all transportation can be denied them under the statute unless they obey the illegal requirement, it is not even apparent that they could put themselves in a position to be arrested and prosecuted, even if they sought to test their constitutional rights in that manner, which we hold they do not have to do.

Judge Hastie: Does that case have to do with the propriety of interim relief or the propriety of final relief?

Mr. Kohn: That case deals with final relief, sir, and I was simply answering Your Hono-'s question, which I took to be, as to whether there is a remedy in equity.

There are many cases, and I should like to give you some of those, on preliminary relief.

Federal courts have issued preliminary injunctions in instances of a variety, including criminal penalties and others having been enjoined, and including the injunctions against both federal and state officials.

For example, in the Youngstown Sheet & Tube case, [fol. 27] which Your Honors will recall, in 1952, the District Court of the District of Columbia issued an injunction against very high public officials, the Secretary of Commerce of the United States and others acting under executive order during a period of great crisis, during the height of the Korean War and during a strike-bound situation, and the Court nevertheless said that where there would have been irreparable harm, and there was irreparable harm, they enjoined these high public officials from exercising the authority which was given to them by appropriate statute and executive order.

In the next case we cite on our memorandum, in the Board of Supervisors case, state officials were enjoined from denying admission to the state university to the plaintiff in a suit contesting the Louisiana segregation statutes.

In the All-American Airways case in the Second Circuit in 1953 a local community had passed an ordinance shortly after Judge Patterson's unfortunate death in an airplane accident, and there the failure to enforce that ordinance might subject the inhabitants of that community to very grave danger to their personal safety, and, nevertheless, the Court there, in a preliminary injunction case, had no hesitancy in granting the preliminary injunction pending the determination as to whether the statute was unconstitutional.

[fol. 28] Judge Hastie: In those cases was not the irreparable injury something considerably more than the likelihood of being arrested and fined?

Mr. Kohn: In some they were and in some they were not. I have saved for the last the case where the fine and the prosecution is the principal thing, the case in the United States Supreme Court itself, the case of Hynes v. Grimes Packing Company, 337 US 85, where the Court said this—I think it is worth reading, just this paragraph,

at some length. That was a statute in the Territory of Alaska which imposed criminal penalties on certain fishermen if they did not comply with the requirements of the law, and the United States Supreme Court there, in sustaining a preliminary injunction issued by the District Court, said this:

> It is not a threaf of a single prosecution, as in the Spielman case, but an ousting of respondents and their employees from the fishing grounds unless each individual person takes a fishing license. Under the findings the respondents could not operate profitably if prohibited from fishing in the reservation area. Many fishermen may stay away from the grounds for fear of punishment. In the pursuit of their otherwise lawful business respondents are threatened with criminal prosecution should they fish in the waters of the Karluk [fol. 29] Reservation without a permit from the native village. For the violation of the applicable regulation under the White Act, severe penalties are imposed, including fine, imprisonment, the summary seizure of boats . . . and their forfeiture to the United States. These sanctions denied to the respondents an adequate remedy at law, for to challenge the regulation in an ordinary criminal proceeding is to hazard a loss against the payment of a license fee and compliance with the fishing rules. . . . Yet to stay out of the reservation prevents the profitable operation of the canneries. In such a situation a majority of the Court thinks that the "danger of irreparable loss is both great and immediate" and properly calls forth the jurisdiction of the Court of Equity.

Here we have substantially the same situation. Our employees will be subject to very severe penalties, that is, these fines, including, if the fine isn't paid, the possibility of going to jail.

Now, in such a situation we are met—and, as I say, if necessary to establish these facts, which I think are almost self-evident, we can, we do have a store manager here to put testimony on the stand—this will require us to close on Sunday.

Now, this is the kind of business where the net margin [fol. 30] of profit is very small, in a sense, it is something like these supermarkets or other large retail merchandising firms, where the net carry-over, the net profit is small, but there are certain very substantial overhead and other costs.

Take for example, and there was evidence in the prior record, a typical Sunday brings in gross sales of as much as $100,000 or so. In those gross sales, as part of the profit that you get, is a substantial portion, 10 or 15 per cent, which covers your general overhead out of the total mark-up of 20 or 22 per cent.

If we fail to do business on one Sunday and fail to recapture that portion of our overhead costs we, in effect, lose the entire net profit on a couple of million dollars' worth of business. So that every Sunday, and Sunday being our largest day, we are met with this very severe loss, which can, if continued, actually make the total operation impossible of continued maintenance.

I think this is a situation very much like any situation where, for example, in a picket line or for any other reason, a store is threatened with a loss of a substantial volume of business.

There is no doubt about it and, as I say, we can introduce testimony, and one of the purposes of my presentation [fol. 31] here is to try to narrow the issues. We can introduce testimony which will show definitely that there is very great danger in that situation of having to close, and if we have to close we undoubtedly suffer this great irreparable harm. I think that point, so far as the facts are concerned, can clearly be established.

Now, I think the only other problem would be, assuming I am correct on the first two, whether there is some countervailing reason as to why a greater harm would be done to somebody else if this temporary restraining order is issued for, I take it, a limited period, since we are ready to go to trial at the Court's convenience, and as to that I should like to point out what position the District Attorney himself has taken throughout these proceedings—not in any invidious sense, but simply to show, I think, a fair appraisal by him himself as to what the danger was of delay in this matter.

You will recall that this case was originally set for May 18 and shortly before that time, a week before, the District Attorney wrote to us and asked, since he was in Allentown and we were here, if we would apply to the Court for a postponement over the summertime. He gave a variety of reasons, one that a detective who had been assisting him in this case was ill; that his first assistant, Mr. Ritter, was [fol. 32] engaged in a primary fight for the Democratic nomination; that his personal schedule made it impossible for him to come to Philadelphia that Friday—we wanted to take depositions the Friday before the Monday that we were to go on; and then he talked about the possible passage of new legislation one way or the other which would affect this thing.

Now, he, in a sense, asked to have postponed for two months the determination of this issue at a time when he was complying with the restraining order originally issued in this matter, a restraining order which was sustained, or at least the vacation of which was in turn vacated by the Court of Appeals.

During that time, and despite the fact that the restraining order affected only this one plaintiff the District Attorney voluntarily refrained from enforcing this statute against anybody in Lehigh County, so that you had a voluntary abstention by him of all enforcement against everybody in the county other than the Two Guys against whom he was required to abstain from enforcement; he voluntarily continued for a period of, well, it is at least almost four months, he continued voluntarily to refrain from enforcement apparently without any undue harm to the community, or at least he himself thought there was no undue harm.

Then there is a series of letters here in which we keep [fol. 33] prodding to get this matter in a position where it can be decided and the defense attorney holding back and giving one reason or another for delay, until finally we have to indicate that the matter is one which will have to be called to the attention of the Court unless we can get the matter in shape for an early rial.

So that I think in view of that context the District Attorney had indicated that a delay of a couple of months is not going to work any undue public harm, and we think

it is a grave inconsistency on his part to come in here and say that this matter has to be disposed of because of the strong need or the public need for immediate enforcement.

He has in his deposition stated that there is no danger to the health, safety or welfare, either of anybody working in the store or anybody buying from the store during the period which he has refrained from enforcing this Act, and apparently even if the Act is not enforced for some time to come.

I think those in essence are the three criteria before the Court: Is this a real case, a substantial case? Secondly, are we going to be irreparably harmed if there is no temporary restraining order? And, third, is there any countervailing reason why the relief which would otherwise be indicated by the decision of the first two points should not [fol. 34] be granted here?

Perhaps we should just read briefly into the record some of the matters that I have referred to, and perhaps they will be unnecessary if counsel choose to reply at this time. I do not want at this time, if we can avoid it, to get into a trial of the case, which will simply have to be retried all over again.

Judge Hastie: Perhaps we should have an opening from either Mr. Rubin or Mr. McGinley, or both in this case, just to determine what is the area of controversy on the facts this morning.

Opening Statement on Behalf of Commonwealth of Pennsylvania by Mr. Rubin

Mr. Rubin: Thank you, Your Honor.

First, we filed our answer to the amended complaint, and I have two additional copies here, if the Court would like to have them.

Secondly, Mr. Kohn's supplied you with the briefs that were filed by Two Guys from Harrison in the Court of Appeals proceeding. I have copies of our briefs, if you would like to look at them both; that is, there is a brief and a reply brief. Three copies of each.

We agree with the suggestion of the Court and I think with Mr. Kohn's idea, that we really do not have to go too far today on the temporary restraining order issue.

Our point is this. If this Court feels that there is really [fol. 35] a substantial question of constitutionality of the Pennsylvania Sunday Law to be decided, and if they find that there is irreparable injury to be suffered by this plaintiff if the law is enforced against it, for today's purposes that should be sufficient to allow issuance of a temporary restraining order.

Further testimony as to the actual facts of enforcement in Lehigh County, which itself raises no three-judge questions, since it would not involve the constitutionality of the Act, should await the full trial on the merits of the case.

We have argued before twice—before Judge Grim and before the Court of Appeals—as to the substantiality of the question. I think that all that can be said for the Court of Appeals' decision is that it says nothing about that question, that it said Judge Grim had no jurisdiction to act, and vacated his judgment.

Judge Hastie: I suppose if the Court of Appeals had thought the question frivolous it would have ordered the action dismissed, would it not?

Mr. Rubin: I doubt it, Your Honor, because in the view they took of the case, that Judge Grim had no jurisdiction to do anything with the case, I think they would have then sent it back to Judge Welsh.

[fol. 36] Judge Hastie: Why constitute this three-judge court if the Court of Appeals thought it was a frivolous question?

Mr. Rubin: They believed that it had to be convened because Judge Welsh ordered it.

The Court of Appeals has no power to order the convocation of a three-judge court.

Judge Welsh: They stated that in the opinion.

Mr. Rubin: Yes.

Only the Supreme Court can order the convocation of a three-judge court, if it is denied, by mandamus remedy.

So that the Court of Appeals necessarily could not pass on that issue. All they could pass upon was whether Judge Grim should have gone ahead, and they said he should not have. Judge Grim, of course, said apparently there was no substantial question, in the argument.

Our point as to the substantiality of the question is simply this: At least six or seven times in the past eight or nine years the United States Supreme Court has been confronted with appeals from decisions of state courts of highest resort which have upheld the validity of various state Sunday Laws. In every one of those cases, except one, which was a certiorari case, and you can forget it, the appeal [fol. 37] was dismissed for want of a substantial federal question.

Now, Mr. Kohn takes the position that some of those cases are not on point with this case. I agree that they are not directly on point, but some of them are very close to this case, and at least one or two of them are directly on point, and those one or two are the most recent. I point to the cases of Ullner v. Ohio and Kidd v. Ohio, which you will find discussed in this mimeographed brief that we have handed up today.

Those cases involved enterprises in the State of Ohio not unlike the enterprise of the plaintiff here. They were convicted for operating on Sunday; they appealed through the state court system; their convictions were upheld; appeals were then filed and jurisdictional statements submitted to the Supreme Court raising all of the issues that are raised here, whether it is a religious law and hence unconstitutional or whether it is a law that is discriminatory on its face because of the exceptions built therein, whether the enforcement of the law, aside from what the law itself says, has been unconstitutional. And despite this full-scale attack on these laws the Supreme Court dismissed for want of a substantial federal question.

At the time we argued this point in the Court of Appeals there was some controversy as to whether the fact [fol. 38] that these cases arose from state courts rather than federal courts would make a difference in the disposition.

Judge Welsh: The allegation of discrimination in the Ohio case?

Mr. Rubin: Yes, sir.

Judge Welsh: Was there any proof of it?

Mr. Rubin: As I understand it, the proof is much like the proof that Mr. Kohn presented here, but let me em-

phasize, Your Honor, as to the discrimination point, if this Court finds that the law raises no substantial federal question, the constitutionality of the law, then this Court, even Mr. Kohn has said in his brief, should dissolve and remit the matter to a one-judge court for determination of whether a constitutional law is being enforced discriminatorily.

Judge Hastie: Well, if the law is discriminatory on its face—

Mr. Rubin: On its face, it is a different question.

Judge Hastie: —that, of course, would be different.

Mr. Rubin: But those two discriminatory arguments were raised, whether the law is discriminatory on its face or whether it is being enforced discriminatorily regardless of what the law says, and, as Mr. Kohn pointed out, [fol. 39] as I said, if this Court feels there is no substantial question, he agrees it should go back to a one-judge court for the remainder of the hearing.

So that when the United States Supreme Court dismisses for want of a substantial federal question, as I said, we argue: Does a state court appeal differ from a federal court appeal?

At that time I took the position that there was no difference. The fact that they used different language in an appeal from a federal court, that is, that the matter is so obviously insubstantial as not to warrant further argument, does not connote something different from the language they use in dismissing an appeal from a state court, that both are dispositions on the merits. The Court of Appeals did not have to pass on that point.

Since the argument in the Court of Appeals the United States Supreme Court itself has gotten involved in an argument on the noting of probable jurisdiction in an appeal and in the memoranda filed by the justices in that case they said clearly that a dismissal of an appeal from a state court for want of a substantial federal question is a disposition on the merits of the case, and they dispose of the case that way solely—there are two reasons: One, is this case frivolous and therefore not worthy of being argued? [fol. 40] Or, two, is the matter so sufficiently foreclosed by existing precedent that we will not want to hear it? Those are the same criteria that should apply here.

I do not want to say that Mr. Kohn's case is frivolous; it is not frivolous, there is no question about it, but we do assert that these prior decisions of the United States Supreme Court, including these two at the most recent term of the Court, have so foreclosed the issue of substantiality now that there is nothing left for a Court to decide.

That is why I was so bewildered when Judge Magruder's opinion came down and noted that he made no mention of any of these cases that the United States Supreme Court had so dismissed, except one that I recall; that was the case that arose in New York in 1950, involving a kosher butcher, who remained closed on Saturday, opened on Sunday. He was convicted for violating the New York Sunday Law; his case was appealed through the New York Court of Appeals, which upheld the conviction against similar attacks as are present here, and then on his appeal to the United States Supeme Court it was dismissed for want of a substantial federal question.

Judge Hastie: The new law that became effective on the 10th of this month, on its face, imposes heavy penalties for a selected group of commercial activities.

[fol. 41] Mr. Rubin: Yes, sir.

Judge Hastie: Is there anything that makes it clear beyond doubt that this is a reasonable classification on which to penalize these and not other businesses?

Mr. Rubin: First, Your Honor, let me say that the penalties that are imposed are up to one hundred dollars for the first offense. I do not want to let the intimation remain that there is a flat required penalty of $100 for the first offense.

As to whether or not a classification is reasonable, we, of course, get into the legislative police power. Can the Legislature make classifications in a Sunday Law that say in one case you might be penalized more severely than in another case? I think it can if the classifications are based on some reasonable legislative belief that the object of the heavier penalties is the area of activity in which the greatest abuse is being found. I am not really ready today to discuss at full length what the legislative viewpoint is.

Judge Hastie: I was just wondering if that is not an issue

as to which there is something to be said on both sides that a Court would have to consider.

Mr. Rubin: Definitely there is, but it is our position that the Legislature can classify as long as that classifica- [fol. 42] tion has an element of reasonableness about it.

Judge Hastie: But is this so obviously reasonable?

Mr. Rubin: I think the question has to be, Your Honor, is it so obviously unreasonable? It is being attacked. I do not think the Legislature has to defend the reasonableness first. I think the plaintiff must show that it is obviously unreasonable first, and the Legislature should defend itself.

Now, if I can conclude this point—

Judge Hastie: Yes.

Mr. Rubin: —my point is simply this: If the question is thought to be a substantial one, nevertheless, by this Court, and if Mr. Kohn's testimony today, limited solely to whether or not there is irreparable injury here involved, is sufficient to convince the Court that there is, and on the face of it I imagine there is, but we would like to hear the testimony on that sole point, then I think this temporary restraining order might issue without any further testimony.

If the Court feels that there is no substantial federal question raised by the attack on the constitutionality, this Court can dismiss the action as to the three-judge aspect, [fol. 43] send it back to Judge Welsh for determination of the further points in the case.

Now, I would like to beg the Court's indulgence. I have this problem of the next door case going on at 11 o'clock, and I may be running in and out.

Judge Hastie: We shall miss you, but you may commute if you wish.

Mr. Rubin: I want to try to ask the Court there to await the decision here, so that we can just have a uniform disposition of all these cases.

Judge Hastie: Are you speaking for all of counsel?

Mr. Rubin: Yes, sir.

Judge Welsh: Did you say you were on the case next door?

Mr. Rubin: I am supposed to be representing the state when they go in there. I do not know what is going to happen, of course.

Mr. Kohn: I would like to say just two things: First, in our Appeals Court brief we do refer at Page 14 to the case of Butler v. Thompson, in which it was held that the Court of Appeals does have powers with regard to ordering or refusing to order a three-judge court to be convened, and it there indicated quite clearly. There they [fol. 44] ordered the judge who had refused to do it to do it.

One other thing, I think what Mr. Rubin has just indicated underlines pretty clearly the grave public policy that we have here, and the confusion and the needless litigation that we are going to have, seriously, if we cannot get this few months' delay in a civilized manner to try what is a very vexing problem.

Judge Hastie: I think you had better go ahead with your proof of irreparable injury, Mr. Kohn.

PLAINTIFF'S EVIDENCE

Mr. Kohn: Mr. Hubschman.

GEORGE HUBSCHMAN, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kohn:

Q. What is the nature of your employment by the plaintiff, Two Guys from Harrison?

A. I am the general manager of the Allentown store.

Q. What in general are your duties as such?

A. To oversee the general operation of the store.

Q. Is it part of the duties of your office to talk to and find out from the employees what their attitude is with regard to whether they will or will not report for work during the coming Sunday?

[fol. 45] A. Yes, it is.

Q. Have you discussed with any of the employees the problem of their employment in view of the Act which became effective on the 10th and which will affect operations on the 13th?

A. Yes, sir, practically every employee in the store has talked to me during the past week about this new law.

They are very, very concerned about it and believe that with the new provision of each sale or each offer to sell they could possibly put themselves in a position that would be completely untenable.

They have indicated to me that there is very small likelihood that they would show up for work on this Sunday.

Q. How many transactions does your company have approximately on an average Sunday at this time of the year?

A. Well, approximately I would say between eight and ten thousand.

Q. Between eight and ten thousand transactions?

A. That is right.

Q. In addition I suppose to the actual consummated transactions there are numerous unsuccessful offers to sell merchandise?

A. Well, we are a supermarket type of operation and we offer our merchandise for sale just strictly on the shelves; [fol. 46] we display everything that we sell there.

Q. Could you tell me approximately the volume of business in dollars that you do on a Sunday?

A. Well, that would depend on the time of year.

Q. Approximately, at this time of the year.

A. Oh, about $50,000.

Q. Does that continue to mount t[illegible] the Christmas season?

A. It is seasonal. It mounts toward the Christmas season, it mounts toward the summer season, the spring season, depending on which articles come in.

Q. What amount does it become later on towards the Christmas season?

A. In excess of $100,000.

Q. Approximately what percentage of your volume is done on Sunday?

A. Approximately a third.

Judge Lord: How many employees do you employ on a Sunday at this time of the year?

The Witness: At this time of the year, sir, about 200; 225, 240, around that.

By Mr. Kohn:

Q. Would your store operate profitably if it were required to close on Sunday?

A. No, we would not be able to.

[fol. 47] We, as I said, are a supermarket type of operation where your net profit is very small, but your volume is very high. If we were to lose any appreciable amount of the volume, why, it would of necessity wipe out the net profit structure.

Mr. Kohn: That is all, sir, at this time.

Cross examination.

By Mr. Ritter:

Q. Mr. Hubschman, will you mention to the Court the departments which you have in that store?

A. Yes. We have a seasonal department that handles different seasonal items, such as toys at Christmastime or outdoor furniture in the summertime.

We have a clothing department.

We have a hardware department.

We have a home decorating department, with Venetian blinds, lamps, tables.

We have an auto supply department.

We have a sporting goods department.

We have a shoe department, a bakery shop, a snack bar, a camera department, millinery department, record department, jewelry department, ribbon department, drug department, a meat department, a delicatessen department, and a general food department.

[fol. 48] Q. You also have a restaurant department, do you not?

A. That is right, a snack bar.

Q. Approximately how many persons are employed in the restaurant department?

A. Well, right now there are about seven, eight.

Q. In the bakery department?

A. About five.

Q. In the drug department?

A. About nine; nine or ten.

Q. And in the food department?

A. Right now about sixty or seventy in all food departments, both the meat and the groceries.

Q. What portion of the store does the food department occupy?

A. The food department occupies, with the snack bar and the bakery shop, I would say about a third.

Q. About a third?

A. Yes.

Q. The drug department, what portion of the store does that occupy?

A. Oh, I would say a couple of per cent. It is not too large a department.

Q. The bakery department?

A. Also in the same classification, a small area as you [fol. 49] walk in the store.

Q. And the restaurant department?

A. The restaurant is a little bit larger than the bakery department.

Q. What percentage of the volume of business on a Sunday is handled in the food department?

A. Well, that also is seasonal. Right now it is about 25 per cent.

Q. Approximately what percentage is handled in the drug department?

A. I am sorry. I was grouping those together, the drugs and the food, all foods and all drugs. It would be approximately about 2 per cent in the drug department.

Q. Two per cent in the drug and 25 in the food?

A. Roughly, yes.

Q. What percentage in the bakery department?

A. About half a per cent.

Q. And in the restaurant department?

A. The same way, about half a per cent, three-quarters of a per cent.

Q. What is the volume of business conducted in the food department at the present time on a Sunday?

A. On a Sunday?

Q. On a Sunday.

[fol. 50] A. That also depends on the Sunday. Last Sunday I believe it was about $15,000.

Q. How much in dollars was your business in the drug department for the past Sunday approximately?

A. That is a hard one to recall. I believe it was about a thousand dollars.

Q. In the bakery department?

A. A couple of hundred dollars.

Q. And in the restaurant department?

A. About $600.

Q. So then you would say that of your 200 employees on a Sunday approximately half are employed in the food, drug, bakery and restaurant departments?

A. Slightly less than half, I would say.

Q. Slightly less than half?

A. Yes, that is right.

Q. And in the food, drug, bakery and restaurant departments you do approximately 30 per cent of your business, or around a third?

A. Approximately, yes.

Q. Of a $50,000 volume on a Sunday you do approximately $18,000 in the food, drug, bakery and restaurant departments?

A. That is correct.

Q. Were you ever asked to close the food department in your store?

[fol. 51] A. No.

Q. Were you ever asked to close the drug department in the store?

A. No.

Q. The bakery department?

A. No.

Q. The restaurant department?

A. No.

Q. Were you told that you could have those departments open?

A. I don't recall whether we were told. I know the employees were never arrested in those departments.

Mr. Ritter: There are no further questions.

Redirect examination.

By Mr. Kohn:

Q. What would be the effect on future employment by these employees in the non-food and drug departments if they didn't have Sunday employment; would they continue to work at other times or not?

A. We would not be able to—you see, our business mounts up towards the end of the week and is very quiet during the start of the week. We naturally hire our employees and schedule them to work at the peak periods of business during the week. If we were forced to close on a Sunday we [fol. 52] would not be able to give all of our employees as much time as they have now. In other words, we would by necessity get along with less help. We will have to.

Q. What about the employees who couldn't work on Sunday, would they continue in your employ, do you know?

A. No, because we do have quite a few part-time employees also that would work just a few days a week.

Mr. Kohn: That is all, sir.

Recross examination.

By Mr. Ritter:

Q. Mr. Hubschman, you stated that you had to remain open on a Sunday in order to keep your business going, is that correct?

A. Yes.

Q. Now, do you know whether or not a substantial part of your business on a Sunday is due to the fact that your competitors in Allentown and Lehigh County are all closed on a Sunday?

A. No, I would not say that. Naturally, I have talked to many, many customers who have come in the store, and the most important thing that we have that our competitors do not have is a substantial parking lot, where the customer can drive right up to the door of the store and load his car and leave.

[fol. 53] Q. Penn Fruit is right in your vicinity, is it not?

A. Penn Fruit has, I think, a parking lot of about three or four hundred cars maximum.

Q. They have a substantial parking lot, do they not?

A. No, sir, I would not say it was substantial.

Q. Three or four hundred cars is not a substantial lot?

A. When you compare it to our four or five thousand car lot, no, sir, it is not.

Q. At Penn Fruit you can drive right to the door and load up, can you not, the same as you can at your establishment?

A. You can.

Q. Are they open on a Sunday?

A. No, they are not.

Mr. Ritter: That is all.

Mr. Kohn: That is all.

Mr. Kohn: Your Honors, I should like to read into the record just a few lines from the depositions of Mr. McGinley and one of his officers.

Judge Hastie: Is there objection?

Mr. Ritter: We are offering an objection.

Mr. Kohn: I have not indicated what I am going to read yet.

Mr. Ritter: I think now is the proper time to object, [fol. 54] Your Honor.

Mr. Kohn: This is a deposition of the defendant himself.

Mr. Ritter: The defendant is here.

Mr. Kohn: That is immaterial. It is an admission. The deposition of a party is always admissible.

Judge Hastie: I do not see any reason that that would be inadmissible because of the fact that he is here.

It is a deposition that you took in this litigation?

Mr. Kohn: That is right, sir. I took it just two or three weeks ago.

Judge Hastie: The Court will hear it.

Mr. Kohn: This is the deposition of Mr. McGinley taken July 27, 1959.

I am sorry, this has not been filed yet (handing paper to the clerk).

Page 129, Line 13 to Line 21, inclusive.

Judge Hastie: Continue.

Mr. Kohn: This is a question by me:

"Have you made any arrests since the last date shown on the list, Plaintiff's Exhibit 1, for violation of the Sunday Blue Laws in Lehigh County?

[fol. 55] "A. You mean March 29, 1959?

"Q. Yes.

"A. No. We arrested nobody in Two Guys, we have arrested nobody anywhere. We feel that under this restraining order, that it is better if the matter remains in abeyance until we find out what the Court is going to do."

Now, Page 131, Lines 7 to 13, inclusive. This was in response to a question by me, which had been rephrased and debated at some length, as to why he had arrested nobody since March of 1959. The question picks up at Line 4.

"Now I am asking him once again, what is the reason why he has arrested nobody since March of 1959.

"A. To save time, in view of this Circuit Court opinion. Actually, I don't even know whether the preliminary injunction is still active against us or isn't. I just haven't bothered to find out. But I thought that in view of what was going here, that this thing was going to be determined, that we'd just better leave the thing ride in abeyance until we found out."

Now, on Page 157, Lines 9 to 16, inclusive:

"Q. You make no claim that anybody who is a clerk at Two Guys from Harrison was being injured in either his health or his welfare by working on Sunday?

[fol. 56] "A. No.

"Q. And likewise that people who made purchases there were not being adversely affected in their health and welfare by purchasing on Sunday?

"A. No."

If Your Honor please, I would just like to mark in evidence—

Judge Hastie: That is the close of the deposition?

Mr. Kohn: That is all I want at this time for the preliminary injunction here.

May I mark photostats instead of the original correspondence? I think they are reasonably clear. If you prefer the original letters I can give you those.

Judge Hastie: I assume that is sufficient.

(Photostatic copies of letters were marked Plaintiff's Exhibits 1, 1A, 1B, 1C, 1D, 1E and 1F for identification.)

OFFERS IN EVIDENCE

Mr. Kohn: I should like, sir, to offer in evidence letters from the District Attorney of Lehigh County to our office dated May 12, 1959, and June 26, 1959; letters from us to the District Attorney dated June 26, 1959 and July 6, 1959; letter from the District Attorney to us dated July 7, 1959 —rather from the District Attorney's secretary, he was on [fol. 57] vacation; letters from us to the District Attorney dated July 17 and August 7, 1959. This is the correspondence that I referred to in my opening presentation with regard to the apparent attitude of the District Attorney as to the urgency of immediate enforcement or the non-urgency of immediate enforcement of the Act.

Judge Hastie: Is there objection?

Mr. Ritter: No objection, sir.

Judge Hastie: They will be received.

(Plaintiff's Exhibits 1, 1A, 1B, 1C, 1D, 1E and 1F were received in evidence.)

Mr. Kohn: Will Your Honors indulge me just a moment. I think we may be able to close.

I think, Your Honors, as to the preliminary injunction, that is the testimony at this stage.

DEFENDANT'S EVIDENCE

Mr. Ritter: If Your Honors please, since Mr. Kohn just read into the record part of the depositions of Attorney Paul McGinley and picked out those portions which he thought would serve his purpose, I think the Court should also be acquainted with the fact that at Page 129 of the same deposition, on Line 22, there is a question—

[fol. 58] Mr. Kohn: If Your Honors please, I think technically I have a right to object, he cannot offer his own deposition, but in the interest of getting along—

Judge Hastie: I suppose he can if his position is that the portion which you offered does not fully explain. I suppose if there is some more of the same subject matter he could put the entire thing before us.

Mr. Ritter: That is the point, Your Honor. He just read the questions that he wanted to put into the record.

Mr. Kohn: In the interest of getting along I will not object.

Mr. Ritter: There is a question on Page 129, Line 22, from Mr. Kohn:

"Q. There is nothing in the restraining order that prevents you from arresting anybody at any place other than Two Guys, is there?"

The answer on Page 130, starting with Line 1:

"That is right, but I am informed that all of these places are now closed. I mean, the Coplay Discount House I know is closed. I had a call from their lawyer just a couple of weeks ago, Mr. Hessinger. I told him to keep closed or we were going to arrest them. I had a call from the attorney for the Bargain Center, and told him the same thing."

[fol. 59] Mr. Kohn: I take it this sort of thing gets you into more and I should like to read the next question and answer. Page 130:

"Q. Are you testifying now that all the places selling retail merchandise in Lehigh County, other than Two Guys, have been closed since March of 1959?

"A. Oh, I am not testifying that because I don't know."

Judge Hastie: Very well. The Court will look at that whole colloquy in the depositions.

Mr. Ritter: There are other portions, Your Honor, that I could read, but I think you know that he is reading part of it.

Judge Hastie: There is another matter of a factual nature in which the Court is interested that was discussed in the informal meeting with Judge Welsh and me.

At that time I think the District Attorney made some representation with reference to the matter of charge of conspiracy, which was of interest to Judge Welsh particularly in the first hearing.

Would you care in open court to indicate what your position is as to prosecution for conspiracy?

[fol. 60] Mr. McGinley: Yes, Your Honor, as you will probably note from the answer which has been filed to this petition, we have said in there that we are abandoning any thought of any conspiracy. I can inform the Court at this time that our office, in view of the new law, has no intention of bringing any type of conspiracy charges against any alleged violators.

Judge Welsh: May I ask a question here. You used the phrase "at this time."

Mr. McGinley: Nor in the future, Your Honor.

Judge Welsh: This Court will have to consider present and future.

Mr. McGinley: Your Honor, what I had in mind was this, under the old law—

Judge Hastie: Suppose we take a recess for five minutes.

(Recess at 11:10 a.m.)

Mr. McGinley: If I may continue, Your Honor—

Judge Hastie: Is additional evidence to be presented on behalf of the defendant?

Mr. McGinley: I do not think I answered Judge Welsh's question.

Judge Hastie: I am sorry.

Mr. McGinley: The last question he asked was, now or [fol. 61] in the future?

My office can unequivocably state that we will not commence any prosecutions on the conspiracy portion of these cases.

Judge Welsh: Thank you.

Judge Hastie: Is there anything more by way of argument? The parties really in their opening statements gave their positions essentially.

(No response)

Judge Hastie: Let me ask this then, which may have some bearing on the whole matter: When will the parties be ready for trial?

Mr. Kohn: We are ready to start at any time Your Honor will hear us.

Judge Hastie: The week of September 28, is that a week in which counsel have commitments?

Mr. McGinley: If Your Honor please, we have Criminal Court sessions commencing the 28th.

Judge Hastie: How long will that continue?

Mr. McGinley: I would say just that week, Your Honor. The immediate week after that would be fine for us or the week before that.

Judge Hastie: The week of October 5 is a bad one for members of the Court. The week of October 12 seems rela- [fol. 62] tively free. How is that week for counsel?

Mr. McGinley: Fine, sir.

Judge Hastie: Mr. Kohn?

Mr. Kohn: Perfectly all right.

Judge Welsh: Can you give us an idea, gentlemen, about how long it would take? All of us have other commitments and we would like to know, not to hold you down to any given number of days or hours, but just so we can arrange our work, can you give us an idea about how long it would take?

Mr. Kohn: A day and a half or less, sir.

Mr. Ritter: I am certain it will take no longer than that for the defense.

Judge Hastie: I wonder if we should make it Tuesday, the 13th. That would give everyone an opportunity to have Monday for office work and so on.

If Tuesday, October 13, is agreeable for everyone, the Court will direct that this case be calendared for trial at 10 o'clock on the morning of Tuesday, October 13.

Now, as far as this motion is concerned, the Court will take it under advisement and indicate its decision this

afternoon, as we must, because I understand enforcement is imminent on Sunday.

[fol. 63] If counsel from out of town want to get back home I assume you can be advised by the clerk by telephone, if you wish, or if you wish to remain. What would you prefer to do?

Mr. Rubin: I am only speaking for myself, Your Honor. I will have to start back to York this afternoon. It is no hardship on us to call the Court.

Judge Hastie: The Court will take some action before the end of the day.

I do not think it will be necessary to reconvene the Court for that purpose.

Mr. Kohn: Because time is running short and without meaning to be presumptuous in any way, but in the event we should be fortunate enough to have the decision in our favor, may I submit, because of the shortness of time, as I say, a proposed form of order.

Judge Hastie: There is no impropriety in that.

Mr. Littleton: If Your Honor please, may I say something of record?

Judge Hastie: Yes, Mr. Littleton.

Mr. Littleton: The brief which Your Honors permitted me to file, or to hand up rather, is a brief which comprehends the merits of this whole contro ersy as far as we see [fol. 64] it. So that I do not mislead the Court at all may I ask that pending your decision on our motion for leave to intervene in this case, you consider that brief a brief amicus curiae.

Judge Lord: Do we have a copy of that now?

Mr. Littleton: I have handed three copies to the Court.

Judge Hastie: It is obvious that under the pressure of time the Court is going to be able to do very little reading between now and the decision.

Mr. Littleton: It is there if you want it, sir, that is all I ask. an amicus can do no more.

Mr. Rubin: Your Honor, I would like to clarify one point that I have been discussing with Mr. Kohn.

Judge Hastie: Yes.

Mr. Rubin: This is a technical matter on the legislation, that is all.

The amendment that was passed and became effective this week is an amendment to the 1939 Penal Code. It adds Section 699.10 to that particular section. It is not an amendment itself to the old Sunday Law, which is still on the books as 699.4.

Now, in the proposed form of order that Mr. Kohn submitted he said: Restrain from enforcing Section 699.4, as [fol. 65] amended by the Act approved August 10. I think that correctly it should be: From enforcing—well, he already has the order on the old law; it should be 699.10. And that is not an amendment to the old 699.4, as you see, it is a separate subsection.

I just want to clarify that for the purpose of the record.

Judge Hastie: Your position is that it would be violating whatever the Act of August 10, amending what section?

Mr. Rubin: He is correct in so far as he says for violating the Pennsylvania Sunday Blue Laws, the Pennsylvania Act of 1939, PL 872. Down to there it is correct. Then it should read Section 699.10.

Judge Welsh: Is that out?

Mr. Kohn: Change .4 to .10.

Mr. Rubin: 18 Purdons Statute 4699—well, actually we cannot say that, because we do not know. It will be .10 obviously. And then this, as amended by the Act, should be out. That language is not important. It should just have approved August 10, 1959.

Judge Lord: You mean, as amended by the Act approved August 10?

Mr. Rubin: No, the words, as amended by the Act, should [fol. 66] be eliminated.

Mr. Kohn: My position, sir, is simply, I do not agree with Mr. Rubin, but I do not think it is a point sufficient to quarrel about. In either case the meaning is clear if you do sign it.

Judge Hastie: Thank you, gentlemen, this has been helpful, and if there is nothing more the clerk will adjourn court.

[fol. 67]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

[Title omitted]

Transcript of Hearing—October 13, 1959

Philadelphia, Pa.,
October 13, 1959

Before: Hon. William E. Hastie, Circuit Judge, Hon. George A. Welsh, and Hon. John W. Lord, Jr., District Judges.

APPEARANCES

Present:

Dilworth, Paxson, Kalish, Kohn & Dilks, by Harold E. Kohn, Esq., and William T. Coleman, Jr., Esq., and Oscar Brown, Esq., and Morris Efron, Esq., representing plaintiff.

Paul A. McGinley, Esq., District Attorney of Lehigh County, and Ernest F. Ritter, Esq., First Assistant District Attorney, representing defendant.

[fol. 68] Harry J. Rubin, Esq., Special Attorney, representing Commonwealth of Pennsylvania.

Morgan, Lewis & Bockius, by W. James MacIntosh, Esq., and Benjamin M. Quigg, Jr., Esq., representing Pennsylvania Retailers Association, Amicus Curiae.

Albert K. Plone, Esq., Amicus Curiae.

Kenneth Trommer, Esq., Amicus Curiae.

(The following transpired in chambers.)

OFFERS IN EVIDENCE

Mr. Kohn: Your Honors, at the outset we should like to introduce into the record certain admissions from the pleadings. I will simply refer to them now, with leave

of Court and opposing counsel, and the reporter can then copy them into the record at the appropriate time.

First, the amended complaint, Paragraphs 1, 2, 3 and 4 are all admitted.

(Paragraph 1 of the Amended Complaint is as follows:

"1. Plaintiff is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania engaged in operating a store in Whitehall Township, Le- [fol. 69] high County, Pennsylvania, employing approximately 300 persons."

Paragraph 1 of the answer to the Amended Company [sic] is as follows:

"1. The averments of Paragraph 1 of plaintiff's complaint are admitted."

Paragraph 2 of the Amended Complaint is as follows:

"2. The defendant is the District Attorney for the County of Lehigh, Pennsylvania, having his office at 445 Hamilton Street, Allentown, Pennsylvania."

Paragraph 2 of the answer to the Amended Complaint is as follows:

"2. Admitted."

Paragraph 3 of the Amended Complaint is as follows:

"3. Jurisdiction of this Court is invoked under 28 U.S.C. 1331, 1343, 42 U.S.C. 1981 and 28 U.S.C. 2281, 2284."

Paragraph 3 of the answer to the Amended Complaint is as follows:

"3. Admitted."

Paragraph 4 of the Amended Complaint is as follows:

[fol. 70] "4. The amount in controversy exceeds $10,000, exclusive of interest and costs, and the controversy arises under the Constitution of the United States and 42 U.S.C. 1983 (Civil Rights Act) and is to redress the deprivation under color of state law of a right secured under the Constitution."

Paragraph 4 of the answer to the Amended Company [sic] is as follows:

"4. Admitted.")

Mr. Kohn: With regard to Paragraph 5, we offer the first sentence of the answer of the defendants to the Amended Complaint.

(Paragraph 5 of the Amended Complaint is as follows:

"5. The defendant is arbitrarily and discriminatorily endeavoring to coerce plaintiff to discontinue the operation of its business on Sunday by threatening to arrest its employees for alleged violation of the so-called Pennsylvania Sunday Blue Laws (including the amendatory Act of August 10, 1959) and for conspiracy to violate said laws. The said District Attorney, despite repeated requests, has refused to enforce said laws against other persons engaged [fol. 71] in business and worldly employment on Sunday in the aforesaid county."

The first sentence of Paragraph 5 of the answer to the Amended Complaint is as follows:

"5. Defendant admits that he has threatened to arrest employees of plaintiff for violations of the Pennsylvania Sunday laws and for conspiracy to violate said laws.")

Mr. Kohn: Paragraph 7, we offer the first two sentences of Paragraph 7 of the answer to the Amended Complaint.

(Paragraph 7 of the Amended Complaint is as follows:

"7. Shortly prior to the commencement of this action and for some time prior thereto, the defendant had threatened that if the plaintiff attempted to operate its store on Sunday, including Sunday, November 23, 1958, he would cause the arrest of employees thereof, both for violating the Blue Laws and for conspiracy to violate the Blue Laws, the second of which offenses is punishable by imprisonment not exceeding two years. Defendant has continued such threats and has specifically threatened that if the [fol. 72] plaintiff attempts to operate its store on Sunday, September 13, 1959, he will cause the arrest of employees thereof and subject them to the penalties provided by the

amendatory Act of August 10, 1959. The result of such threats which have been publicly announced by the District Attorney is to intimidate the employees of plaintiff who will thereby be coerced not to work, thus requiring plaintiff to close its store."

The first two sentences of Paragraph 7 of the answer to the Amended Complaint are as follows:

"7. Defendant admits that prior to the commencement of this action he threatened to cause the arrest of plaintiff's employees for violating the Pennsylvania Sunday laws and for conspiracy to violate said laws if plaintiff operated its store on Sunday, including Sunday, November 23, 1958. He admits that he has threatened to cause the arrest of plaintiff's employees for violating such of said laws as he has not been restrained from enforcing and to subject them to the penalties provided by the Act of August 10, 1959, Act No. 212, 1959 Session of the General Assembly of Pennsylvania if plaintiff operates its store on Sunday, September 13, 1959.")

Mr. Kohn: Paragraph 9 of the complaint is admitted [fol. 73] and is offered in evidence.

(Paragraph 9 of the Amended Complaint is as follows:

"9. Because of the District Attorney's action threatened against the employees, no plain, adequate or complete remedy exists to redress the threatened injury other than this action for injunction."

Paragraph 9 of the answer to the Amended Complaint is as follows:

"9. Admitted.")

Mr. Kohn: We should next like to stipulate that there will be incorporated into the record of this hearing, with the same force and effect as if the testimony and other evidence were introduced here, the record of the testimony and evidence in the prior hearing on our application for preliminary injunction, which hearing was held on September 11, 1959.

We should next like to offer in evidence copies of certain original records, being a petition to the General Assembly

of Pennsylvania immediately preceding the adoption of the Act of 1794, the petition being presented December 12, 1793; various excerpts from decisions of the Pennsylvania Supreme Court and other Courts of the Commonwealth of Pennsylvania; excerpts from a brief of the Attorney [fol. 74] General of Pennsylvania in a case then pending before the Supreme Court, which we will refer to in detail, the headings appearing upon each of these copies.

It is, as I understand, stipulated that the copies shall be regarded as correct, in the absence of objection or correction by counsel for the defendant with a period of ten days, subject to the discretion of the Court.

I suppose the simplest thing to do is to mark these now, sir.

Judge Hastie: At this point I think it should appear that the defendants will have a week in which to examine the historical materials and submit any corrections or point out any errors which they find in them, and with that reservation the materials offered will be admitted in evidence.

Mr. Kohn: May we have these physically marked now, sir?

Judge Hastie: Yes.

Mr. Kohn: Would you be good enough to mark these in the order in which they are here.

(Petition presented to the General Assembly of Pennsylvania, December 12, 1793, was marked Plaintiff's Exhibit 1.

Extracts from Brief of John Robert Jones, Special [fol. 75] Counsel for the Commonwealth of Pennsylvania, and Thomas J. Baldridge, Attorney General of the Commonwealth of Pennsylvania, in Pennsylvania v. American Baseball Club of Philadelphia, Brief for the Commonwealth of Pennsylvania, 290 Pa. 136 (1927), was marked Plaintiff's Exhibit 2.

Commonwealth ex rel. The American Baseball Club of Philadelphia, 290 Pa. 136 (1927), was marked Plaintiff's Exhibit 3.

Extract from Commonwealth v. Pedano, 33 D. & C. 551, Erie County (1938), was marked Plaintiff's Exhibit 4.

Extracts from Sparhawk v. Union Passenger Railway Company, 54 Pa. 401 (1867) was marked Plaintiff's Exhibit 5.

Extracts from Commonwealth v. Coleman, 60 Pa. Super. Ct. 380 (1915), was marked Plaintiff's Exhibit 6.

Extracts from The Commonwealth v. Nesbit, 34 Pa. 398 (1859), was marked Plaintiff's Exhibit 7.

Extracts from Johnston v. The Commonwealth, 22 Pa. 102 (1853), was marked Plaintiff's Exhibit 8.)

Mr. Konn: The next, Plaintiff's Exhibit 9, would be the third page of the brief filed by the defendant District Attorney in the Superior Court of Pennsylvania in the matter of Commonwealth v. Bauder and Mills, October Term 1958, Nos. 405 and 6.

[fol. 76] I think the easier thing would be for me to read the particular part I have in mind. I think this may be the only copy of this now in existence, and I do not think the District Attorney has any.

Mr. McGinley: I am going to insist that the whole thing be put in evidence, if you are going to read from it. If you want it as a stipulation I disapprove of it unless the whole brief is put into evidence.

Mr. Kohn: Sir, I think when a party makes an admission in the course of a lengthier statement that it is not necessary to introduce the entire matter, you simply introduce that which constitutes the admission. If there is anything else which is necessary to explain or to understand that part then, of course, he has the right to offer that.

Judge Hastie: Why not let the District Attorney examine it and advise if there are other parts there that are explanatory of the part which counsel propose to introduce.

Mr. Kohn: It is simply one paragraph, the first paragraph that I have in mind.

Mr. McGinley: This is not my statement at all, this is a statement from the Pennsylvania cases, as historical background.

Mr. Kohn: Perhaps we should let the Court see what [fol. 77] it is we want to introduce and they can rule on it. This is a brief signed by the District Attorney.

Judge Hastie: The very first paragraph is what you have in mind?

Mr. Kohn: Yes, sir.

Judge Hastie: I doubt if that adds very much to the case, for whatever the case may be worth.

Mr. Kohn: Well, I think it shows that the District Attorney himself as recently as a year and a half ago thought that Christianity was part of the law of this Commonwealth, and that the Sunday Blue Laws were in support of that doctrine.

Mr. McGinley: What the District Attorney feels about that is entirely immaterial.

Mr. Kohn: I think any admission made by a party tends to clarify and narrow the issues. He can try to explain it if he wants, but I think it is still in there as of significance in this matter that he himself was of that view.

Judge Lord: I think the whole brief should be put in because he may qualify that opening paragraph by other decisions.

Judge Hastie: That is why I asked whether there was anything else clarifying it. I do not like to clutter the [fol. 78] record up with what may not be necessary. That is why I asked the District Attorney if there is something in there that qualifies the opening statement.

Mr. McGinley: I think the brief must be read as a whole. That is by way of historical background.

Judge Hastie: Frankly, I do not want to read the brief as a whole unless there is something else in the brief that is relevant.

Mr. Kohn: Well, I will withdraw it. I think it will be easier.

Judge Welsh: Except this, the Retailers Association disclaim any element of religious persuasion in this dispute. This might have a bearing on at least one of the parties to the case, as an expression of their views as to whether there are religious features in it.

Mr. Kohn: I think if a party who is seeking to sustain this legislation says that it has no religious significance, then I think that statement on his part is without evidentiary value, but where a party who is seeking to sustain this legislation says at some time that it does have religious

significance, then I think that is of evidentiary value, because that is an admission against his position in this case. The other is obviously a self-serving declaration, which is not evidence, it is argument, in the absence of [fol. 79] evidence to support the assertion. In other words, if I make an admission against my position that is introducible against me. If I say something in favor of that position that is not introducible by me. The only thing introducible by me would be facts or evidence in support of my self-serving assertion.

Judge Welsh: But the Retailers Association asked to intervene with the defendants here and that was their declaration of policy as I view it, and now this, as I take it, is a declaration of a principle which the District Attorney, in support of the ancient statute, I suppose has put forward in support of his plea.

Mr. Ritter: May it please the Court, I also think in line with what Mr. Kohn has said, all this background as to historical importance is also self-serving to their side of the case and not in evidence.

Judge Hastie: Mr. Kohn has agreed to withdraw this particular item.

What do we have next?

Mr. Kohn: The next thing, sir, will be the stipulation which I referred to, being a stipulation between the District Attorney and counsel for the defendants, Bauder and Mills, in the lower court, in the cases which I referred to just a moment ago.

[fol. 80] I think the easiest way to put that into this record will be to use the printed record in the Superior Court in the Commonwealth of Pennsylvania, where that stipulation appears at Pages 14a to 66a, inclusive, and if we can reserve a number now for that record, we can supply sufficient copies of that for all the members of the Court.

(Stipulation by defendant District Attorney in the cases of Bauder and Mills was marked Plaintiff's Exhibit 9.)

Mr. Kohn: We had some other printed material, but I think we would like seriously to consider it and see whether we want really to put it in or if we want to eliminate it.

Judge Hastie: All right.

Mr. Kohn: I would like to continue to think that over until after lunch.

Judge Hastie: Does that conclude the exhibits? I do not mean to foreclose something that may come up during the course of the trial in open court, but so far as you now can tell does that conclude your exhibits?

Mr. Kohn: I think so.

There will be a number of books, texts and so on referred to by our expert witnesses. They will be presented in court. I do not myself have a list of them, but I think some of [fol. 81] them we may want to introduce; some we might introduce, sir, as background material for what the expert testifies to. I do not think we need introduce those now.

I think that is all at the moment, Your Honor, subject to my consideration of these other newspaper clippings that I have.

Judge Hastie: Is there any documentary material that counsel for the other parties propose to introduce?

Mr. Rubin: The only thing I have in mind, and I am not sure if I want to burden the Court, is the testimony at the legislative hearings.

Judge Hastie: Very well. You will not be foreclosed.

Let me raise this. What are the issues that you propose to develop in open court? I do not mean the detail of your testimony, but the issues in dispute to which you propose that your testimony should be addressed?

Mr. Kohn: We propose to show that the Sunday laws in the Commonwealth of Pennsylvania are laws in support of religion, of a particular religion, the Christian religion; that the purpose of the Sunday laws is to commemorate and honor, and to enforce commemoration and honor to the Resurrection, which is a principle and cardinal doctrine of [fol. 82] the Christian religion; that this religious law and its observance is regarded by various religious groups, including, among others, the Jews and the Seventh Day Adventists, as offensive and as compelling them to do honor to the religion of another.

We also propose to show that it is regarded by both the Seventh Day Adventists and the Jews, the Orthodox Jews, as being a Biblical Commandment that six days of the week thou shalt labor, which means that it is God's will that you

shall work six days, those six days being Sunday to Friday, inclusive, the seventh day being the Sabbath, Saturday, the day of rest.

We also propose to show that the legislation which we are attacking is discriminatory, arbitrarily discriminatory.

Judge Lord: In what way? How is it discriminatory?

Mr. Kohn: Well, the legislation itself is discriminatory. For example, certain items are singled out as items which may not be sold at retail on Sundays, and certain other items, for which there is no logical, reasonable or rational basis for distinction, may be sold on Sunday.

We also propose to show that certain activities are arbitrarily exempted from the Sunday laws on wholly arbitrary [fol. 83] hours and other activities are not; for example, one sport you may perform and other sports you may not.

Judge Hastie: Is that a matter of proof or is that a matter of argument in the face of the statute?

Mr. Kohn: That is an issue. I am not going to offer any evidence on it.

Judge Hastie: I mean the scope of your proof. I think it is helpful for us to have the whole thing.

Mr. Kohn: For example, it is illegal to play golf on Sunday, but it is not illegal to play tennis on Sunday, and I defy any man to draw a rational distinction between those two. It is illegal to buy an automobile on Sunday under the old Act. Under the new Act there is imposed a fine of one hundred, two hundred dollars for buying an automobile, but if you buy a seat cover for an automobile under the old Act that is a $4 fine for the whole day's activities.

Houses and furniture are the other way around. For example, if you buy a house, that is covered by the old Act, the 1794 Act, so selling the whole house a man is subject to a $4 fine for the whole day's activities. If you want to sell furniture, under the new Act each retail sale of a stick of furniture is subject to one hundred or two hundred dollars fine. I say that is an irrational, arbitrary distinction. [fol. 84] Judge Hastie: Let me interrupt with a question here to get the position of the parties on this. Mr. Kohn just referred to the new Act, being the 1959 Act, and the old Act. As I understand it, in this case a threat has been made to prosecute the plaintiff under the new Act.

Mr. Kohn: That is right, sir.

Judge Hastie: Now, do counsel interpret the new Act as leaving persons subject to it also subject to prosecution under the old Act, or does the new Act, as concerns persons covered by it, supersede the old Act?

Mr. Kohn: It is my understanding, sir, that the new Act does not supersede the old Act.

Judge Hastie: Even as to persons covered by it?

Mr. Kohn: It is my understanding it remains enforceable against persons covered by the old Act. Incidentally, they are not enforcing it against us, but against the employe s.

Judge Hastie: Is that also the understanding of the District Attorney?

Mr. McGinley: It is mine.

Mr. Rubin: I would qualify it to this extent. Since the new Act specifically takes care of things that the old Act [fol. 85] did not cover I think then the District Attorney would be limited to the new Act.

Judge Hastie: I am referring particularly to this plaintiff in its operations and its employees.

Is it the understanding of counsel that defendant's employees commit two crimes; one, a violation of the new Act and, two, a violation of the old Act? If one of the employees sells on Sunday does he commit two crimes?

Mr. Ritter: I would say he could be prosecuted under either Act, either under the 1939 Act or the 1959 Act, depending on what he sells.

Mr. McGinley: I think this, that there is a distinction in that respect, Your Honor; under the new Act, which would be the one that we indicated we were going to proceed under on the 13th of September, an employee could be arrested on the same day a number of times for a number of acts or actions, while under the old Act you could only arrest once that day as to each employee. Of course, it has not been tested as to whether in that particular way the new Act supersedes the old. I think it has been suggested that they are parallel Acts and that the District Attorney would have the right to proceed under either one. That is what I think. The Attorney General might have a little different philos-
[fol. 86] ophy on that.

Mr. Rubin: My conclusion would be that to the extent that the new Act specifies a crime for certain sales you must proceed under the new Act.

Mr. Kohn: Isn't it my understanding that in the Middle District the Commonwealth has taken the position that the District Attorney can if he sees fit enforce the old Act even as against persons selling those items which are specifically covered by the new Act? As a matter of fact, that is what he is doing.

Mr. Rubin: We have not quite taken that position.

Judge Hastie: That answers my question.

Mr. Kohn: One other thing. I did not mean to close. I just got into this discussion.

We also, of course, propose to show that the District Attorney has enforced this Act in a discriminatory manner against this plaintiff and its employees.

Mr. Ritter: Since there are two Acts now, I do not think the District Attorney has had the opportunity to enforce the 1959 Act with discrimination.

Judge Hastie: That would be relevant I assume only to the 1939 Act, and that is one of the reasons I inquired as to just how in view of the parties and to what extent the [fol. 87] 1939 Act is involved in this case by these plaintiffs.

Mr. Kohn: I think the 1939 Act and the 1959 Act are both an integral part of this case. I think that in brief is what we propose to show, namely, that the Act is religious legislation, that it is discriminatory, and that this defendant has enforced it in a discriminatory manner.

Judge Welsh: I would like to know what form the presentation of evidence will take and what kind of testimony you propose to offer.

Mr. Kohn: Well, first, we have the matters that have been introduced into the record already; secondly, we propose to offer the testimony of two experts, one Jewish and the other Seventh Day Adventist, to show what they understand to be the origin of the Sunday celebration, and why they regard it as offensive to their particular religious groups.

We also propose to offer the testimony showing what the District Attorney did and why he did it, which will be in the form of excerpts from the District Attorney's deposi-

tion taken in this matter, and the testimony of Mr. Hess, who is the gentleman who we contend was responsible for the District Attorney's actions in this matter, and has been [fol. 88] attempting to enforce this law—I am talking now about the old law—against this particular store, when the law had not been enforced by him against anybody for the entire duration of his term in office, or against anybody in that county by anybody.

Judge Hastie: Is Mr. Hess now available? There was some question as to his availability.

Mr. Kohn: No, he is not. He is presumably sojourning some place outside of Philadelphia.

Judge Hastie: Does that answer your question, Judge Welsh?

Judge Welsh: Yes. Thank you.

Mr. Kohn: There was one matter. Mr. Hess was subpoenaed to come here for the preliminary phase of this matter. Perhaps he is still subject to the subpoena, but I have no desire to burden this record at this time with any contempt or other proceeding. I would like though, as I gave indication last week, that the closing of this record be deferred until we have an opportunity to present Mr. Hess' testimony. I understand from what Mr. Shestack said, when he was in chambers last week, that Mr. Hess will not be away for more than about two weeks.

Judge Hastie: You may present that at a proper time in open court.

[fol. 89] Gentlemen, we can go in and open court, but unfortunately we are not going to be able to proceed long before lunch, because the District Judges have a meeting and we will have to recess at 12:15, and then we will continue in the afternoon. So we will now proceed in open court.

[fol. 90] (The proceedings continued in open court.)

ORDER DENYING MOTION OF PENNSYLVANIA RETAILERS ASSOCIATION FOR LEAVE TO INTERVENE, ETC.

Judge Hastie: Before counsel speak, the Court has denied the motion of the Pennsylvania Retailers Association

to intervene. However, it has granted the Pennsylvania Retailers Association leave to file a brief amicus curiae, and also to participate in argument on the matters of law.

The clerk will take the Order which has been signed.

We also have motions for leave to file briefs as amicus curiae, one on behalf of the Retail Clerks District Council No. 11.

Mr. Plone: That is right, Your Honor.

Judge Hastie: (Continuing) And the other on behalf of the Pennsylvania Federation of Labor.

Mr. Plone: Yes, sir.

Mr. Trommer: Yes, Your Honor, and I would like to make another request on behalf of Retail Clerks Local 1390, independently, for that same purpose.

Judge Hastie: To do what?

Mr. Trommer: For Retail Clerks Union Local 1390, a Philadelphia local union.

Judge Hastie: Has that been filed?

Mr. Trommer: Not formally, Your Honor.

[fol. 91] Judge Hastie: This is to file a brief amicus?

Mr. Trommer: Yes, sir.

ORDER GRANTING REQUEST FOR LEAVE TO FILE BRIEFS AMICUS

Judge Hastie: Then all three of those requests to file briefs amicus will be granted, and if counsel will prepare orders for them.

Mr. Trommer: Thank you, Your Honor.

Judge Hastie: I hope that you gentlemen will all realize that each brief represents an additional burden of reading matter for the Court, and I hope you will try not to make your briefs repetitious.

Mr. Trommer: I appreciate that.

Mr. Plone: If Your Honor please, I am not permitted to speak, I am a member of the New Jersey Bar, sir. Mr. Trommer is associated with me, and I would ask special permission to be permitted to appear in this matter, in the capacity you have just indicated, because we are counsel for District Council No. 11.

Judge Hastie: Very well.

Mr. Plone: My name is Albert K. Plone, I am a member of the New Jersey Bar, and of the Third Circuit Court and the United States Supreme Court.

Judge Hastie: The Court will be glad to admit you for the purposes of this case.

[fol. 92] Mr. Plone: Thank you very much, Your Honor.

Mr. Trommer: Thank you, Your Honor.

Judge Hastie: The Court is ready to proceed to the trial of Two Guys from Harrison-Allentown against McGinley. I believe counsel for all parties are here.

You may proceed, Mr. Kohn.

Plaintiff's Evidence

Mr. Kohn: Professor Hoenig, will you take the stand, please.

Professor Hoenig: I want to use the Hebrew Bible.

Sidney B. Hoenig, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kohn:

Q. Dr. Hoenig, will you get available to you whatever records and books you need. I think you have your brief-case there.

Dr. Hoenig, will you please tell us what your academic training has been.

A. I received my baccalaureate degree from the College of the City of New York and was ordained by the Rabbini-[fol. 93] cal Seminary of the Yeshiva University. I also have my Doctor of Philosophy Degree from the Dropsie College here in Philadelphia.

Q. What is your present occupation?

A. I am professor of history at Yeshiva University and also director of its Department of Adult Education.

Q. Will you tell us what if any fields you have specialized in during your work at Yeshiva University.

A. My particular speciality is in the history of the intertestimental period, the Rabbinic period, from the destruction of the First Temple about 586 Before the Common Era until about the year 135 of the Common Era, and the Rabbinic Period beyond that, until about the Third or Fourth Century.

Q. By "Common Era" you mean the period that is commonly denominated as A.D.?

A. Yes, we generally use the term "C. E." in scholarly works rather than the term Anno Domini.

Q. Have you made a study of the origin and development of the Sabbath—by that I mean Saturday for the purposes here—and the Sunday Observances, with particular reference to their observance as a day of rest?

Mr. Rubin: At this time, Your Honor, we object to any testimony of expert witnesses at this point as to raise the question of religion, which Judge Magruder indicated in [fol. 94] the Massachusetts case, that their position was limited to the particular plaintiffs who had a religious standing to raise the issue.

We now want to put our objection on the record to the right of this plaintiff to raise that issue.

Judge Hastie: The Court will hear the evidence and reserve judgment on the question as to whether a plaintiff who does not himself claim to be offended by the religious matter can raise this question.

You may proceed, Mr. Kohn.

By Mr. Kohn:

Q. Dr. Hoenig, will you please proceed and tell us in your own words the origin and development of the Sabbath and the Sunday, the relationship between the two, and the matter of the observance of Sunday as a day of rest, and refer to whatever texts you want, identifying them as you refer to them.

A. Very well. The basic source for the observance of the Sabbath is found in the very first part of Genesis, speaking

of the creation of the world by God in six days and resting on the seventh day.

This is repeated in the Decalogue, which is found in the Book of Exodus and also in Deuteronomy. You have the phrases there, as the Fourth Commandment: Remember [fol. 95] the Sabbath Day, to keep it holy, and observe the Sabbath Day.

Throughout the First Century in Judea and in Palestine the Sabbath, the seventh day, was always kept as a day of rest. The Rabbinic laws always affirmed that.

When we come to the First Century in the period of the rise of Christianity, we do find that Jesus observed the seventh day. There are references in the gospels.

You have it in Matthew 12, where Jesus walks through the field with his disciples and they pluck certain corn; the Pharisees, because of their rigors, tried to prevent them; and there you find in Verse 8: For the Son of man is Lord even of the sabbath day.

There are many references throughout the gospels also of Jesus preaching in the synagogue on the Sabbath Day, and it was well recognized that the seventh day was to the Jews the day of rest.

Q. By seventh day you mean what is known today as Saturday?

A. Basically, from the time of creation, according to the reckoning, the first day was the time of the creation of heaven and earth, and so in Genesis we do have the full references to all of the modes of creation during the various days—man created on the sixth day, and the seventh day was the day of rest. We have reckoned in this fashion, and that has never been changed throughout all our history.

[fol. 96] Q. What is the first day of the week?

A. The first day of the week is what we commonly call today Sunday.

Q. What is the seventh day of the week?

A. The seventh day is what we commonly call now Saturday, but these terms, Sunday and Saturday, naturally are not taken from the Jewish sources, because the Jewish sources use the term, "the first day of the week" or "the seventh day of the week." When we speak of Sunday we

I have here Barnabas, the epistle of Barnabas, one of the first Church Fathers, who was in the very First Century, and he has here a chapter on the false and the true Sabbath. He speaks naturally in the most figurative fashion, taking the verse from the psalms, that the day of the Lord is a thousand years, and he comments upon that in a most theological fashion. If I may be permitted to read certain portions of it, he says:

> Attend, my children to the meaning of this expression, he finished in six days. This implied that [fol. 100] the Lord will finish all things in six thousand years. For a day is with him a thousand years, and he himself testified, saying, Behold, today will be as a thousand years. Therefore, my children, in six days, that is, in six thousand years all things will be finished. And he rested on the seventh day: This meaneth when the Son's coming shall destroy the time of the wicked man and judge the ungodly and change the sun and the moon and the stars, then shall he truly rest on the seventh day.

You notice that all of this is being interpreted in a very theological manner, and it concludes:

> Your new moons and your sabbaths I cannot endure.

He comments upon a verse in Isaiah.

He says:

> Ye perceive how he pleases, your present sabbaths are not acceptable to me, but that is which I have made, when, giving rest to all things, I shall make a beginning of the eighth day, that is, a beginning of another world; wherefore, also, we keep the eighth day with joyfulness, the day also on which Jesus arose again from the dead.

In this fashion you find the earliest of the Church [fol. 101] Fathers, Barnabas, speaks of the eighth day as the day of the Lord, that is, the day of the resurrection.

It is found in Revelation too. In Revelation 1:10 you have also the use of the term the Lord's Day for the eighth day of the week, in the cycle of the weeks.

Q. Did this choice of the first or eighth day as the day upon which to celebrate the resurrection of the Lord, did that have any purpose or point vis-a-vis the observance by Jews of the seventh day as the Sabbath?

A. At the very outset, the seventh day was observed as a day of rest and the eighth day was observed by the Christians as the day of resurrection, which meant that in earlier days the eighth day was not considered as a day of rest at all; the Lord's Day was not in any way associated with the notion of complete rest, it was associated only with the notion of the resurrection of Jesus. Hence you find the term Lord's Day used throughout as stressing this particular element.

You find in the epistle of Ignatius some references to that. He speaks of the Ebionites and the Nazarenes, and he mentioned: After the observance of the Sabbath let every friend of Christ keep the Lord's Day as a testimony, the Resurrection Day, the queen and chief of all the days of the week.

Again, he has another phrase there: If, therefore, those [fol. 102] who are brought up in the ancient order of things can come to the possession of a new hope, no longer observing the Sabbath, but living in the observance of the Lord's Day, on which also our life has sprung up again by Him and by His death.

In other words, we have definite proof here from the early Church Fathers that they regarded the day which we call commonly Sunday as the day associated with the resurrection, per se, and not with the notion of rest.

Q. Now, how did that development proceed to the point where you do find the Sunday, the first or eighth day, becoming a day of rest?

A. May I point out that we have records of the relationship of the Roman Empire to the various peoples in their different countries.

Rome had controlled Judea, had controlled North Africa and other areas, and very often we see the attitude of the Roman Emperors toward the observances of certain days by the Jews.

For instance, we find in Josephus, in Antiquities 16 an interesting decree by Augustus Caesar, who declares that

mean the day of the sun, or Saturday the day of Saturn. Therefore, there would not be any usage of these terms in accordance with the form that we use today.

Judge Lord: Doctor, what is your authority for stating that Sunday, as we know it generally, is the first day?

A. The authority is found in the fact that even the Church Fathers, when they speak of Sunday, also use the eighth day there as referring to the recurrence of the week; that is one source. And throughout the Rabbinic sources, again and again, we have the term first day as the day on which the entire creation of the world began.

In fact, another proof may be that the sources speak of the first day after the Sabbath. In fact, you find that in the story that I have here, in Matthew 28:1: In the end of [fol. 97] sabbath, as it began to dawn toward the first day of the week.

Therefore, they regarded the Sabbath as being the last day of the week, and the first day of the week following immediately thereafter.

Mr. Kohn: I happen to have here the Protestant Bible, sir, and in the concordance to it you see a very brief reference, if Your Honor is interested, which I think confirms that which I think is generally recognized by all religions.

The Witness: As I was pointing out, the observance of the seventh day, it is called the seventh day too. The Bible uses the term Yom Sh'vii, which is definitely the seventh day.

In fact, in our psalms today in the synagogue we always refer to the Sabbath Day as the seventh day, hence that would be from the beginning of the creation, of the first day which we regard as the Sunday.

By Mr. Kohn:

Q. You were telling us then that the Jewish faith observed the seventh day as the Sabbath, as the day of rest, in accordance with the Biblical command.

Now, what happened with the advent of Christianity? Would you trace the next step?

[fol. 98]. A. The gospels point out that the crucifixion occurred on the Friday, and the Sabbath was observed then too.

In fact, the story is found in Chapter 28 that Mary, the Mother of Jesus, had come to the tomb there, and it was on the day following that she saw the spirit of Jesus, that he had risen.

Q. Now, just so that we can recapitulate, the crucifixion occurred on Friday.

A. On Friday. The Sabbath was observed then because they could not do anything—roll the stones away from the sepulcher on that day, because it was the observance of the seventh day, but they came on the next day, as you find at the end of most of the gospels, in Matthew and in Luke. Let me read the end of Luke, which will perhaps clarify that—oh, when I was talking, Mark, because most of these elements are found in all of the four gospels:

> And very early in the morning the first day of the week, they came unto the sepulcher at the rising of the sun.
>
> And they said among themselves, Who shall roll us away the stone from the door of the sepulcher?

Because they had observed the Sabbath before. And then the entire picture here:

> And entering into the sepulcher, they saw a young [fol. 99] man sitting on the right side, clothed in a long white garment; and they were afrighted.
>
> And he saith unto them, Be not afrighted: Ye seek Jesus of Nazareth, which was crucified: He is risen; He is not here: Behold the place where they laid him.
>
> But go your way, tell his disciples and Peter that he goeth before you into Galilee.

Now, on that basis the eighth day has become the Lord's Day and you find the Church Fathers—

Q. What do you mean by the Lord's Day?

A. The Lord's Day refers to the day of the resurrection of Jesus, and we find that definitely recorded in the very earliest of the Church Fathers.

no Jew can be forced to be called to the court on a Saturday, nor on the ninth hour on Friday; that is, on the eve of preparation, as it was then called.

[fol. 103] Q. By the way, while we are on that, when does the Jewish Sabbath begin—when does the Jewish day begin?

A. The Jewish day, as recognized by the rabbis, begins with sunset, and from sunset to sunset is the mode of counting.

We have always the night before the day, and that is based upon the phrase in Genesis: And there was evening and there was morning the first day.

Upon that we consider that the day begins with sunset and goes on until the next day. For instance, yesterday was the Day of Atonement, and we began it on Sunday night at sunset and concluded the fast day yesterday at sunset.

Now, I was speaking about the attitude of the Roman Emperors toward the observances by different peoples. I have here what I consider a real interesting phase of comment by Philo Judaeus. Philo Judaeus was the first philosopher who lived at the beginning of the Common Era, and he has here in this particular chapter in his Embassy to Gaius, when they had come to the Emperor to appeal for certain things, he has then reference, speaking again of Augustus Caesar's privileges and mode of conduct with the people. It reads:

> Moreover, in the monthly division of the country, when the whole people receives money or coin in turn, [fol. 104], he, that is Augustus Caesar never allowed the Jews to fall short in their reception of his favor, but even if it happened that this distribution fell on the day of their sacred Sabbath, on which day it is not lawful for them to receive anything or to give anything, or, in short, perform any of the other duties of life, he charged the dispenser of these gifts and gave him the most careful and special injunctions to make the distribution to the Jews on the day following.

You will notice that he stresses here, on the day following.

—That they might not lose the effects of his common kindness.

And this has been the mode of conduct which the Roman Empire used for centuries.

There might have been some of the emperors perhaps who were not so lenient, who were not thinking of the welfare of their people. Hadrian, for instance, about the year 132, began to persecute the Jews, forbidding circumcision, forbidding the observance of the Sabbath and the holidays, and it brought real pang and disaster upon the people.

If we go back to the Maccabean period, those who were the first martyrs in the world. They were forced to forget their Sabbath because of Antiochus Epiphanes, who was [fol. 105] one of the emperors of Seleucid regime, and that brought also much difficulty and trouble.

That is the reason we continue to observe the Feast of Lights throughout all of our centuries. And even in the gospels we have reference to Jesus observing the Feast of Lights, the Chanukah, in order to show this evidence of liberty that had been disregarded by those emperors.

Q. Was Antiochus one who compelled the Jews to refrain from observing their Sabbath, the seventh day of the week?

A. Yes, you find that in the Book of Maccabees—the first and the second Books of Maccabees, which are in the apocryphal section, where definite information is given about his forceful compulsion upon the Jews in this matter.

Q. And that led to a very bloody revolt, the Maccabean revolt?

A. It lead to the revolt of the Maccabees in the year 168 and brought disaster upon the people, until finally even the Seleucids recognized the need for freedom of observance by the Jews, and it was given later on in the year 141, when Simon Hasmanean became the ruler. We have decrees in the Books of the Maccabees as well as in Josephus enunciating this fact.

Q. To this day the Jewish people regard the Maccabean revolt as one of the most important phases of their history, [fol. 106] do they not?

A. Yes, sir; in fact—

Q. One which is celebrated even today by an 8-day long holiday?

A. Yes, and it is observed by every group of Jews, no matter what their opinion is, they recognize this as one of the strongest—

Judge Hastie: Mr. Kohn, let me interrupt you a moment. Is the purpose of this testimony to evidence the deep and fundamental commitment of the Jewish religion to the Saturday? That is not the purpose of it?

Mr. Kohn: That is one phase of it.

The basic part of Dr. Hoenig's testimony will be to show that Sunday is not that Sabbath, in the first place, and, secondly, that Sunday commemorates the resurrection.

Judge Hastie: I was going to say, if it was the first, I do not know, but I would suspect that that would be conceded without controversy that there is that very deep and fundamental commitment to the seventh day or what we call Saturday as the Sabbath.

Mr. Kohn: I think there is an abiding misconception that Sunday is the Sabbath, the day of rest; it is not, and this [fol. 107] witness will develop it, it is a day, the Lord's Day, to commemorate the resurrection of Jesus, which is why the Jews, whether they observe Saturday or not, regard it as offensive.

Judge Hastie: It is testimony about Sunday.

Mr. Kohn: Yes, sir.

By Mr. Kohn:

Q. Would you continue, sir?

A. I was speaking of the attitude of the Roman Emperors, and we come now to the Fourth Century, to the period of Constantine.

Constantine was the Emperor about the year 325. He was one of the pagans who observed the sun day—Mithras—and then later on, according to the records, he had seen a vision and was victorious. On the basis of the victory he decided to accept the Christian faith. He was influenced by many of the bishops and we find—

Q. Is he the emperor who said that if he was victorious he would embrace Christianity?

A. Yes, sir.

Q. And in this sign—

A. Yes,

Q. —the sign being the sign of the cross.

A. Yes. Because of this particular victory at Milvain he [fol. 108] finally accepted that, but we know that he was still wavering, since there are certain references to that.

It was in his period that the Council of Nicaea was called, and this Council of Nicaea was the first Council which began to make certain changes to separate the Christians from the Jews.

One was with reference to the Passover and the Easter.

In other words, Jews and Christians observed the Passover on the same day, but the Council of Nicaea decreed that from—

Q. Passover and Easter?

A. Passover and Easter the same time, but in order to make a differentiation it was decreed that the Easter should be observed the first Sunday after the vernal equinox, so that it should not fall on the Passover. In other words, the theological aspect of stressing the notion of the resurrection, of Easter, was uppermost in their minds, to divorce from the Jewish concept of the Passover.

Q. What was the other phase?

A. The other phase was the element of Sunday.

Eusebius, who is the ecclesiastical historian, makes reference to what had been done by Constantine.

Constantine was one who had given his imperial power, [fol. 109] using, in a sense, the civil legislation, as directed by the church, to impose the acceptance of the first day of the week as a day of worship.

I have here the particular source from the life of Constantine by the Church Father Eusebius, and this is what he points out:

> He ordains, too, that one day should be regarded as a special occasion for prayer—that refers to Constantine's decree—I mean that which is truly the first and chief of all, the day of Our Lord and Saviour—again reference to the resurrection. The entire care of his household was entrusted to deacons and other min-

> isters consecrated to service of God and distinguished by gravity of life and every other virtue, while his trusting bodyguards, strong in affection and fidelity to his person, found in their Emperor and instructor the practice of piety, and like him held the Lord's Day in honor, and performed on that day the devotions which he loved.
>
> The same observance was recommended by this blessed prince to all classes of his subjects, his earnest desire being gradually to lead all mankind to the worship of God. Accordingly, he enjoined on all the subjects of the Roman Empire to observe the Lord's Day [fol. 110] as a day of rest and also to honor the day which precedes the Sabbath; that is, the day of crucifixion, Friday, precedes the Sabbath, and the Lord's Day.

Q. And that is when the day which honors the resurrection became by Constantine's legislation a day of enforced rest on the entire community?

A. It was not finally—

Q. For Romans and Christians too.

A. It was finally accepted, yes, sir, the Council of Laodicea later on had enforced it, and many of the bishops, as we see, Augustine has reference to it.

But it is interesting that when one examines this excerpt from Eusebius that he says:

> His desire was to teach his whole army to honor the Saviour's Day, which derives its name from light and from the sun. He freely granted to those among them who are partners in the divine faith leisure for attendance of the services of the church of God, in order that they might be able, without impediment, to perform their religious worship.

What Constantine did was to regard the Lord's Day as the day of worship, and there are many references in the Church Fathers as to the mode of worship, whether they stand or they kneel.

[fol. 111] But those who were engaged in agriculture were not forced to do that. In fact, the stress here is, those were for partakers of the divine faith. They went to worship, and they were able to continue their work later on, after the worship.

In fact, Constantine even went so far as to call the market days, the fair days, on Sunday, to attract the country people from their farms to the cities so that they could engage in the markets and their trade and at the same time attend the worship.

This is an interesting manner in which they utilized the day of worship also as a means of attracting trade.

We find that again and again. Acobard of Lyon also makes reference to that. Sunday was really the day of the fair.

This is what we find in Eusebius; and then later on other decrees were issued, but Augustine, who is the foremost Church Father, gives a full comment on the Fourth Commandment of the Decalogue, and he points out that we are not commanded to rest, because that day is not a day of rest, it is a spiritual day of rest. Let me read that, and you will see how they took the concept of the Sabbath as a spiritual day of rest and permitted all sort of other [fol. 112] labors on that particular day, from the Christian viewpoint.

This is in the Letters of St. Augustine, in Chapter 12:22. I am going to read only certain portions, because it is somewhat lengthy:

> It is also for this reason that of all the Ten Commandments that which related to the Sabbath was the only one in which the same commandment is typical, the bodily rest enjoined being a type which we have received as a means of our instruction, but not as a duty binding also upon us.

And he continues:

> For instance, we have been taught literally not to worship idols, and the precepts enjoining us not to take God's name in vain, to honor our father and

mother, not to commit adultery, or to kill, or to steal, or to bear false witness.

Mr. Kohn: Read a little more slowly. The reporter has to take this. Whatever you read he has to take down.

A. (Continuing) All right, I shall repeat.

> —or to kill, or to steal, or to bear false witness, or covet our neighbor's wife, or covet anything that is our neighbor's, are all devoid of typical or mystical meaning, and are to be literally observed, but we are not [fol. 113] commanded to observe the day of the Sabbath literally in resting from bodily labor, as it is observed by the Jews. And even their observance of the rest as prescribed is to be deemed worthy of contempt, as the Christian Church Father mentions.
>
> The Lord's Day, however, has been made known, not to the Jews, but to the Christians by the resurrection of the Lord, and from him it begun to have the festive character which is proper to it.

And he continues telling of the pious, the dead, and so forth.

In other words, Sunday was a weekly resurrection, as Easter is the period of the annual resurrection, and it is associated with the Lord's Day of Resurrection generally.

Q. In other words, each Sunday then commemorates the resurrection?

A. Yes, the weekly resurrection.

Now he says:

> Of this condition of active exercise, the eighth day, which is also the first day of the week, is a type, because it does not put an end to that, it glorifies it.

Then he continues with reference to the Lord's passion:

> There was no injunction given to them that they [fol. 114] should take a day of the week into account, waiting until the Sabbath was past, and consider now with attention these three most sacred days: The day

signalized by the Lord's Crucifixion, rest in the grave, and resurrection.

This is Augustine's definite notion of his importance of the Lord's Day.

Q. Following Constantine what was the next period when the development of Sunday as a day of rest was magnified?

A. Throughout all of history there seemed to be a battle. There were individuals, theologians too, who did not want to consider the Sunday as the day of rest, and it seemed that the Church finally predominated and influenced the civil authorities.

In the Eighth Century you already have the Church dominating the local authorities and others in making that the compelling day of rest.

Q. Why did the Church want the first day, or Sunday, as the day of rest?

A. Well, I think it is natural to understand that the very fundamental and basis is the belief in Christ.

Q. Was there at any time any activity, action or recommendation on the part of the Church specifically directed against Jews in connection with the observance of Easter [fol. 115] or Sunday as the day of resurrection?

A. We do find in the course of Jewish history that when Easter came about, Easter Sunday especially, the Jew suffered immensely.

In fact, it was the custom to take a Jew and to slap him on the Easter Sunday, until later on it was changed, and the Jew had to give a Jew's penny.

That was all in commemoration of the resurrection.

I quote here from a Social and Religious History of the Jews by Professor Baron, who mentions:

> During the Holy Week in particular the passion of Christ and His resurrection offered provocative themes of anti-Jewish assaults in theory and practice. We recall the need of special protective legislation and the frequent prohibition for Jews to appear in public streets less they further inflame the aroused passions.

Q. Do you agree with the testimony which Dr. Solomon Grayzel of the Jewish Theological Seminary gave in a recent case summarized by a three-judge court to the following effect: Dr. Grayzel cited the famous scene portrayed in Matthew 27, the trial of Jesus Christ before Pilate. He pointed out that as related in the Christian New Testament the Jews are portrayed as refusing to exchange Barabbas for Jesus but insisted upon crucifixion in spite of the attempts of Pilate to placate the mob. He cited the [fol. 116] washing of hands by Pilate, and then the Verse 25: Then answered all the people and said, His blood be on us and our children. Dr. Grayzel stated that this had been the cause of more anti-Jewish riot throughout the ages than anything else in history.

A. I fully agree with Dr. Grayzel's statement. In fact, I made a special study of this particular feature, I wrote a book on the Great Sanhedrin, the origin and development of the great court in the Second Commonwealth period, and if dealt with this element of the crucifixion, an historic angle.

Yes, it is because of that that the Jews have suffered immensely throughout all of the ages, and again and again this story has brought torment, until some of those who are really tolerant and recognize freedom of conscience and religion try to keep that only within the Church and not to bring it out into the market place.

Q. What is the attitude of the Jew with regard to the observance of Sunday?

A. Observance of?

Q. Of Sunday. What does it signify or symbolize to a Jew to be compelled by law to refrain from working on Sunday?

A. If a Jew is compelled to observe the Sunday, if he is forced to observe the Sunday, it would be basically considered as forcing him to recognize the resurrection of [fol. 117] Jesus. He may be idle, that would be something else, but that does not in any way consider that he—the Bible tells us: Six days shalt thou work. Which means, according to Rabbinic interpretation, man should work on six days; he shall not be idle.

Judge Welsh: Would that forcing that you just referred to, Doctor, be considered as a forcing of a philosophical doctrine, or a physical command, or a political prohibition?

The Witness: It would be the recognition of a theological doctrine which is forced upon the Jew if he is made to observe the Sunday.

Mr. Kohn: That is all, sir.

Judge Hastie: Have you finished with your examination in chief of this witness?

Mr. Kohn: Yes, sir.

Judge Hastie: Is there cross-examination?

Mr. Rubin: Yes, sir.

Judge Hastie: We will reserve the cross-examination until after recess, and the court will now be recessed until two o'clock.

(Luncheon recess 12 o'clock noon to 2 o'clock p. m.)

[fol. 118] AFTERNOON SESSION

(Appearances as previously noted.)

SIDNEY B. HOENIG, recalled.

Cross Examination.

Judge Hastie: Proceed with cross-examination.

Mr. Rubin: Thank you, Your Honor.

Could I have the reporter read the last question and answer, as posed by Mr. Kohn and answered by the witness?

(The last question and answer were repeated by the reporter as follows:

"Q. What does it signify or symbolize to a Jew to be compelled by law to refrain from working on Sunday?

"A. If a Jew is compelled to observe the Sunday, if he is forced to observe the Sunday, it would be basically considered as forcing him to recognize the resurrection of Jesus. He may be idle, that would be something else, but

that does not in any way consider that he—the Bible tells us: Six days shalt thou work. Which means, according to Rabbinic interpretation, man should work on six days; he shall not be idle.")

[fol. 119] By Mr. Rubin:

Q. Professor Hoenig, you gave some discussion from the Letters of Augustine which I would like to go back to for a moment, dealing with the Christian viewpoint toward Sunday as a day of rest. Could you go back into that testimony slightly. I was not sure whether you were saying that at that time Augustine said Christians must refrain from work on Sunday or whether he was eliminating the physical aspect of Sunday and making it a spiritual day only.

A. May I utilize that source?

Q. Surely.

A. Augustine discusses here the Ten Commandments and points out that all the commandments are to be taken literally, except the Fourth Commandment which deals with the Sabbath. He states:

> But we are not commanded to observe the day of the Sabbath literally in resting from bodily labor, as is observed by the Jews.

And he continued to stress that the interpretation of the Sabbath is in a spiritual sense, meaning the spiritual rest vested in Jesus.

Q. Now, when he uses the word "Sabbath" there he means Saturday, as we understand it, is that right?

A. Yes, he means Saturday.

[fol. 120] Q. What was the attitude of Augustine if any towards Sunday; does that enter into this particular discussion?

A. He mentions it later, that the Lord's Day is to be observed as the day of worship in commemoration of the resurrection.

Q. Was it also his view that the Lord's Day was to be observed as a day of physical rest, just as the Jews observe Saturday, the Sabbath?

A. He stresses more the element of worship. As he mentions here; it is a spiritual rest and not a physical one.

Q. So that that mention, which specifically refers to the Sabbath, you would say also was his view as to the Lord's Day, and Christian obligation also?

A. I don't know from my historic knowledge. I recognize that the day was set aside as a day of worship, and there are evidences that there were occupations which were permitted even to the Christians.

Judge Hastie: May I interrupt to ask: Do you point to any dogma, Christian dogma, requiring the refraining from labor on the day of worship?

The Witness: This was later on accepted in the Council of Laodicea in about 380, yes, where, through the influence of the Church, which was the Council, the imperial state likewise accepted that, but it was only as the result of the [fol. 121] Church influence upon the state.

By Mr. Rubin:

Q. So that to some extent the influence of the Council, which was some centuries later than Augustine modifies or expands upon Augustine's restrictions on the Lord's Day activities?

A. You say some centuries later. Augustine was in the same period as these Councils, just maybe twenty-five or fifty years later.

Q. So that whenever it was, and I will withdraw any reference as to the years, I don't know, the Council itself went further than Augustine did in the proscriptions put upon activity on the Lord's Day.

A. In the course of the centuries naturally there were various Church councils that tried to enforce it, but there is a struggle against the sabbatical notion of the Lord's Day which you would find in all of the records of the Councils of the Eighth and Ninth and Tenth Centuries.

Q. When you say a struggle against the sabbatical notion of the Lord's Day, exactly what do you mean by that?

A. I mean the notion that that particular day was to be a day of complete rest; that the Lord's Day was to be a day of complete rest. There were many who were opposed to this sabbatical notion.

[fol. 122] Q. That is, within the Christian Councils themselves?

A. Yes.

Q. Going on to your discussion of the Fourth Commandment, from the Jewish viewpoint would you say that it is required of a Jew that he work six days a week? You used the word "should" in the answer to this last question I believe.

A. I used the word "should." Most of us, whenever we read the Bible, depend upon the King James Version, but as I recognize the source I will repeat it in Hebrew, and then give you the exact translation. The Hebrew version:

She'shet yamin ta'avoid v'a-si-ta kol m'lach'ta-cha,—
Six days shalt thou do work—
—v'yom ha-sh'v'u'—
—and on the seventh day—
—sabbat.
—shall be the Sabbath.

The rabbis, in commenting upon that, tell us that one should be engaged in labor throughout the six days, because lack of labor brings to indolence, to idleness, and brings to all sorts of evil. It is the Sabbath Day which is only to be devoted to rest.

Q. Would you say that it is a requisite of Judaism today that a member of that faith work six days a week?

[fol. 123] A. Are you asking about devout Jews?

Q. Well, let us say Orthodox Jews, as we understand it.

A. Yes, the Orthodox Jew is engaged in labor six days a week, and it is found in a source called Abot d'Rab Nathan where that is expressed.

Q. So that to be a practicing Orthodox Jew a person must work six days a week, which would necessarily—

A. He should be engaged—now, naturally, that doesn't mean he has to do any manual labor, there are all kinds of work which one may do, but he should be engaged in activity, because even the Book of Genesis points out:

Asher burru elokim la'asos.
Which God created to do.

In other words, God had created a world. It is man's duty to continue God's creation by his activity.

Judge Hastie: May I interrupt to ask, would that be satisfied on Sunday by doing work around the home and that sort of thing, rather than by gainful employment?

The Witness: I believe it is not a question merely of a gainful employment, it is a question of helping one's fellow man. If one were to engage only in work at home he might be restricting himself, he might not be able to help others.

Judge Hastie: I gave that as an example. Work in one's [fol. 124] garden, home beautification, would that satisfy the requirement of busying oneself on six days?

The Witness: No, I do not think so, Judge, because that would be considered in the sense of a hobby, puttering around the garden, but from the phrase that I understand, the Rabbinic notion: He shall be engaged in gainful employment which is for the promotion of society.

Judge Hastie: May I ask one other question: Is there or has there been any Rabbinic or leadership opposition to such a thing as the campaign of organized labor for a 5-day week? Has that met with any disapproval?

The Witness: There has not been any disapproval of it, because the notion is that at least the Sabbath should be allowed to the Jews to observe. If they are forced to observe the Sunday it seems ironical that they cannot observe the Sabbath Day; therefore, if a 5-day week in some way allows—it depends what the 5-day week is, if it allows them to observe the Sabbath it won't be denied.

By Mr. Rubin:

Q. Well, if the 5-day week, Professor, is Monday through Friday, does your answer still hold?

A. Monday through Friday, 5-day week, it would not fulfil the notion of the—Six days shalt thou labor.

Q. Specifically, then, if an Orthodox Jewish merchant [fol. 125] whose occupation and vocation is the ownership and management of a small retail store, and who regularly closes on Saturday, observes the Sabbath, also closes on Sunday as a matter of private volition, would he be then in derogation of this concept?

A. If he has enough funds to support himself that is his own private recognition, he can do whatever he pleases, he doesn't have to work all week. The only thing he has to do

something of a gainful value for society. He has to do something, even on a Sunday, for the promotion of the weal and comfort of the entire group.

Q. So that the idea that he must do something six days a week does not mean that he must do on Sunday what he normally does Monday through Friday for a living, so to speak, as long as he does something which society gains by.

A. The point is this, if he were going to do—as a teacher, if I were going to do something else—let us say I were to start laying bricks—I wouldn't do anything of a gainful employment. I have to do something which is within my own scope of possibility.

Q. Suppose you were not a teacher, but a bricklayer.

A. A bricklayer, then I should do something on—

Q. (Continuing) And you spent Sunday studying and improving your mind.

[fol. 126] A. The Sabbath is to be spent for the studying, but I should do some kind of work within the score, within the manner of my work, on the Sunday, to fulfil that Commandment—Six days shalt thou labor.

Q. Would it be fair to conclude from this that it is necessary that he do something gainful in the sense that society will gain by it, but not necessarily that he do the exact thing that he does the other five days of the week in order to support himself and his family?

A. I think this is a most peculiar question, if I may say so, because no man—suppose he is selling shirts on Sunday, that does not mean that he cannot sell pajamas also on the next day. In other words, you are trying to limit me to a certain mode of conduct.

Do you follow me there?

Q. No. What I am really trying to find out is whether or not an Orthodox Jew, in order to be devout to the principles of his faith, must do on Sunday the work that he normally does Monday through Friday?

A. The word "malacha" in the Bible means labor, and naturally there are all sorts of categories of labor. There are thirty-nine categories of labor which are recorded with reference to the Sabbath. Now, he is to do one of these thirty-nine categories of labor. And you find that in the [fol. 127] days of Nehemiah—let us say you mentioned be-

fore retail selling, which also would be considered sale-sale would be considered part of the activities.

Q. Leaving the Orthodox Jewish belief, you will admit, will you not, that not all Jews would work on Sunday even if the law didn't exist?

A. Oh, yes, certainly.

Q. In other words, it is quite common in society as a matter of just practice?

A. Well, because of the environment, because of circumstances, because of the historic development in the course of centuries.

Q. What do you mean by that?

A. I mean that the fact is that since there has been a preponderance of the Christian population in the world Jews, perforce, have had to yield.

Q. But, as a matter of fact, today, and recognizing the fact that the environment may consist of a preponderance of Christians, do you think that Jews today feel that they are being put upon because they can't work on Sunday?

A. I think they do.

Q. All Jews?

A. Most Jews do. I cannot speak for every Jew, because just as there are in the Christian faith so many minds and [fol. 128] sects, so among Jews you have various opinions. Even in any school you have various opinions of different philosophers.

Q. So that at least there is among Jewish groups the opinion that it is perfectly all right not to work on Sunday regardless of whether or not the law exists?

A. Yes, but they don't want to be compelled to observe the Sunday. Every Jew, no matter whether he is of the extreme, wants to be allowed the full freedom. If he wants to work on the Sunday he shall not be compelled to say that he must observe Sunday.

Q. Well, you clothe this in your opinion as a matter of religious belief or as a matter of individual social philosophy?

A. It is a basic belief, even the non-observant Jew will react against the compulsion of having to observe the Sunday, because, again, as I mentioned before, it all is associated with the element of the resurrection, and even the

most non-observant Jew, if he is even flagrant in even observance, will feel that the fact that he has to observe Sunday is a sort of acceptance of the notion of the divinity of Jesus, and the resurrection.

Q. Professor, do you really believe that all Jews understand Sunday to have been so firmly tied to the concept of the resurrection?

A. Are you mentioning all Jews? Or are you qualifying it?

[fol. 129] Q. I would like to eliminate the scholar. I understand, you know full well, and we all agree I think with the outline of the background you gave, but aside from the scholarly element in Judaism—

A. Yes.

Q. —do you think that the average Jew, who has not delved into the scholarship, today consciously believes that he is being forced to refrain from work on Sunday because of the ties with the concept of the resurrection that Sunday holds?

A. Basically he knows that.

Yes, I will assert that every Jew, whether he is informed or not, feels down deep in his heart that this Sunday is the Lord's Day and is associated with the belief in Jesus, and there is the element which might affect him.

Q. I am puzzled by some of this, Professor, for several reasons. First, as I recall, at least one, and I think several Jewish members of the Pennsylvania General Assembly voted for the Act of 1959. Now, I bring that up only to ask how do you regard that in light of what you just said.

A. I am a New Yorker. Would you read for me that Pennsylvania Act of 1959?

Q. I am sorry, the Act of 1959 is a recent Act which forbids the retail sale on Sunday of certain products. I have a copy of it here.

[fol. 130] A. May I see it?

Mr. Kohn: Are you asserting as a fact, Mr. Rubin, that certain Jewish members of the Legislature voted in favor of that law?

Mr. Rubin: I can assert the fact that I know of at least one.

Mr. Kohn: And how about the correlative of those who did not vote for it?

Mr. Rubin: He is perfectly capable of explaining that.

The Witness: I do not know why you bring in this matter of Jew or non-Jew into this, because just as among Christians you have those who do not accept the law, you have among Jews, but basically I think these members of the Assembly, as you point out, if they were to know the association, and if they had just recollected—sometimes they don't even think of it; many things we do without even thinking—I believe that this Act would be in complete opposition to their basic religious notions, even though they are not observant.

By Mr. Rubin:

Q. So that you would explain it by saying probably they do not understand?

Mr. Kohn: He gave a couple of explanations I think.

[fol. 131] The Witness: I don't know. I haven't spoken to those men. If I were to speak to them I would know exactly whether they understood or not.

By Mr. Rubin:

Q. Secondly, and I assert this as a fact, subject to any qualifications if I am wrong, I understand that the Pennsylvania Retail Clerks Association supported this new law, and that among the membership of the Retail Clerks Association there are a large number of Jewish citizens.

Mr. Kohn: That is objected to, Your Honor.

Judge Hastie: What is your objection, Mr. Kohn?

Mr. Kohn: The objection is that that is completely irrelevant.

Judge Hastie: I do not know. There has no question been asked. There was a statement made by Mr. Rubin and now if Mr. Rubin will ask his question the Court will determine whether it is objectionable.

By Mr. Rubin:

Q. My only question is this: If that be a fact, and I believe it is, how would you explain that in light of your

answer to my previous question, that most Jews do regard the Sunday law as having this religious overtone.

Judge Hastie: Do you object to that?

[fol. 132] Mr. Kohn: That is objected to.

Judge Hastie: The objection is overruled. Proceed.

The Witness: Education is one of the greatest features in every realm and in every religion. We have Jews who cannot read the Sidar. We have many outstanding men who cannot even read the Hebrew alphabet. They have been somewhat divorced from their Jewish basic faith.

I do not know who these retailers are, it may be they do not have this cognizance, but I am sure if you were to ask them they would recognize that Sunday is associated with the Lord's Day.

By Mr. Rubin:

Q. Going to the law itself, Professor Hoenig, if you understand the problem in this case, we are dealing with really two laws, both of which in effect prohibit activity on Sunday of various natures, what would be the regard of the Jewish theologian, the Jewish scholar, toward an Act of this kind, if it contained an exception for those persons who conscientiously observe the seventh day of the week as the Sabbath?

Mr. Kohn: That is objected to, sir, as being immaterial.

Judge Hastie: What is the relevancy of asking about [fol. 133] another law that is not the law before us, Mr. Rubin?

Mr. Rubin: I am not really asking about a law, Your Honor, I bring it up because I think it is relevant to the basic objection we are making as to this particular plaintiff's position in the case; that is, even if such a law were on the books we would say this plaintiff would not have standing, he could not take advantage of it, unlike the Orthodox Jews in the previous case.

Judge Hastie: I understand you are asking the witness what the theological position would be with reference to a law which made an exception such as you just mentioned.

Mr. Rubin: That is right. So that they could work on Sunday and rest on Saturday if they wished.

Mr. Kohn: That, sir, is not the law that is before us, and I think it is irrelevant and going to get us into an irrelevant discussion.

Judge Hastie: The objection will be sustained.

Go on with your next question.

Mr. Rubin: That is all.

Mr. Kohn: That is all.

Judge Hastie: Will you have any further need of the witness? Do you wish him to remain? If he wishes to remain, of course, he may, but I wonder whether either party [fol. 134] will require him further.

Mr. Kohn: We will not need him.

The Witness: All right, I may stay here, Your Honor, to learn.

Mr. Kohn: Elder Odom.

Robert L. Odom, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Kohn:

Q. Elder Odom, you are a member of the Seventh Day Adventists, are you not?

A. Right.

Q. What is your profession or occupation?

A. I am a research editor—

Judge Hastie: You may sit, sir; it is not necessary to stand.

A. (Continuing) —connected with the General Conference of Seventh Day Adventists at their World Headquarters in Washington, D. C.

By Mr. Kohn:

Q. And you have come up here at our request to testify in this matter?

A. Right?

[fol. 135] Q. What are your duties? What does your work consist of?

A. For many years I have been an editor and an author both book and magazine, in this country and in several other countries, and at the present time I am doing book editing and research work, besides my regular clerical work from time to time, for I am an ordained minister of the Seventh Day Adventist Church, and with credentials from the General Conference itself.

Q. In the course of your work have you had occasion to study the relationship and differences between the Sabbath, Saturday, and Sunday, the first day?

A. Yes, I have spent about thirty-five years of extensive research both in this country and in Europe, most of the leading libraries, including the Pontifical Library in Rome, because I have written at least two books on the subject, and I have another one in manuscript form. Because this, of course, is a subject naturally of interest to me and to my fellow communicants.

Q. Now, will you tell us, please—

Mr. Rubin: Your Honor, is it necessary for me to repeat our basic objection to any of this testimony?

Judge Hastie: You may have that as far as both witnesses, yes.

By Mr. Kohn:

[fol. 136] Q. Will you tell us in your own words what you understand to be the origin and the development of the Sabbath, the Saturday; the first day, the Lord's Day; and the explanation of the attitude and faith of the Seventh Day Adventist as between these two days?

A. Well, Seventh Day Adventists believe that the Sabbath originated at creation—creation week. It was the blessing of the seventh day; the sanctifying or setting apart of the seventh day for holy use back there that started the custom of what we call the 7-day week and the practice of resting one day in seven.

We believe also that the Decalogue that was given to the Hebrew people, as most Christians in the world believe, contains the Moral Law of God; and that it is sinful and wrong to steal, to murder, to lie, to covet, to commit adultery, to disobey our parents, to worship idols, or have any

other God, and also to desecrate the day which God himself has blessed; and the fourth Commandment is, of course, the basic source of our belief that the seventh day is the Sabbath of "the Lord thy God," that it is not an institution of the state, a festival, we will say, like the Fourth of July, or Armistice Day, or other festivals that have been instituted, but that it is in its very origin and nature a religious institution, it belongs to God.

[fol. 137] Now, when we come over to the Christian time—the Seventh Day Adventists are Christians—we believe from the Christian Scriptures that Jesus Christ was the creator, all things were made by him; that in his own right he declared himself to be the Lord of the Sabbath. So we regard Jesus Christ as the Lord of the Sabbath and we worship him on the Sabbath, because he is the Lord of the Sabbath.

As Christians we feel that because he is the Lord of the Sabbath we owe it to him, if we love him, to keep his Commandments; that it is not a matter of force.

We think that we have in the New Testament abundant evidences, not only in Christ's own keeping the Sabbath, which, of course, the Jews kept, the same identical Sabbath—though there was disagreement regarding the manner, there was never disagreement regarding the day—then in Luke, the 23rd Chapter and the last Verse we read that his disciples associated with him in his Sabbath keeping, attending the synagogue with him. After they had buried him, the Lord of the Sabbath returned the Sabbath Day and rested according to the Commandment. Verse 56.

And so we go over into the epistles. We find the Apostle Paul holding approximately eighty some odd Sabbath meetings, not only with Jews in their synagogue, but also with gentiles.

[fol. 138] And so we come down through the Christian centuries. We find that in almost every age among Christians there have been Sabbath keeping Christians, including Seventh Day Baptists, Seventh Day Church of God, and many other groups.

So, to us, this is a heritage that has come down to us from creation, and reinforced and taught by Our Lord Jesus Christ, and as Christians that is the source of our belief.

Q. What is the origin, as you understand it, of Sunday, and the significance attached to Sunday?

A. The general teaching of the Christian world at large was the teaching that we have in that respect, that it was instituted at some time in commemoration of the Lord's resurrection.

There is one disagreement between us and the other group, because I have formerly been a Sunday keeper, and now a Sabbath keeper, so I am well acquainted; we deny that there is any commandment, and we know of many Protestant clergymen and Catholics who side with us on that—that there is no commandment in all of the Scriptures where we are told that it is a sin to work on Sunday; that the Sabbath has been transferred from the seventh day to the first day, though we admit that Jesus Christ did rise from the dead and he appeared to his disciples on that day; [fol. 139] but that he left no commandment, he left no blessing, he left no sanctification.

We believe also that God has never forbidden the holding of religious meetings on any day of the week. So, therefore, like other churches, we have our prayer meetings in midweek; we have sometimes our camp meetings running all the week; we have our conference sessions and other devotional exercises on other days. But we do not regard the fact that Jesus or somebody else may have had in the past a religious service on that day, and that that made it sanctified and it is to be construed as a law and a commandment, and making it sinful to work on Sunday. We find in the New Testament no commandment not to work on Sunday and, therefore, I think we differ in that respect.

Now, according to my findings and our people, and we have historical evidence for it, that since the Christian Church in its infancy was a Jewish Church, the Sabbath was kept along.

Even Augustine himself, in one of his letters, one to Januarius and one to Casolinus, for example, he tells how that he himself and his mother kept the Sabbath. He said that when he was a boy in Milan, for instance, with the great Bishop Ambrose, that his mother had come from her hometown, she had been used to fasting on the Sabbath, that was a custom there to fast; when she got up there where Am-

[fol. 140] brose was they didn't fast, and she was perplexed to know what to do, so she went to the good Bishop. He tells the story twice in his writings. And Ambrose was the man who coined the phrase: When in Rome do as the Romans do.

He said: I will tell you what I do; when I am in Rome I fast. For the Roman Church was observing Sabbath, but making it a fast day. The fasting practice began back about the year 144 only. And so, he said, but when I am here I don't. So his mother accepted it.

Augustine himself says that in his diocese over in North Africa in certain sections the custom of fasting on the Sabbath was practiced, in other Churches it was not, and he said: When I meet with the one Church I fast with them; when I am with the other group I don't.

You will find that the Sabbath question—even the Council of Laodicea had several canons in there, some of them forbade Judaism on the Sabbath; it did give instructions regarding the holding of religious services and the reading of the Scriptures.

And even as late as the Great Schism between the Eastern and Western Churches, and you can find it in The Greek Fathers, read the correspondence of Cardinal Humbert, the legate of the Pope, Leo. There the controversy, nearly all of the Church historians, and even the Atheist Gibbon, [fol. 141] list the Sabbath as one of the primary issues between the East and West. Some places, Augustine and various writers, including Socrates and Eusebius tell us that there were groups in some areas by the Third and Fourth Century that kept both days; one as a festival of the resurrection, a supplementary Church festival to the seventh day Sabbath.

Q. When you say as a festival of the resurrection you mean as a religious festival?

A. As a Church festival, not commanded of God, but as a Church festival, because, as I have said, there is not in the New Testament, and I say this categorically, any commandment to keep Sunday, or forbidding work on it, or declaring it to be a sin, though the record is clear that Jesus rose on that day.

In other parts there were Christians who kept only the Sabbath; then in other places there were some who kept Sunday.

The idea of resting on Sunday, abstaining from work, does not appear in the writings, and I have examined them in both the Greek, the Latin, and the translation—the first appearance is in Tertullian, where he suggests that they should not work. Naturally, for their early morning services, where they had them in the early morning in those pagan days, there must have been some absence of labor in [fol. 142] order to attend the service, but there is no evidence—in fact, there is some evidence that many of them, when they went home, they went about their usual affairs, as we see in Continental Europe, for example; I have labored for years over there, and it is a day for political harangues, and bull fighting; it is like the horse racing, sports—baseball and football—and other sorts of things that they have, even fairs are held on Sunday. And so they did back there.

Now, when we come up to the Quadragesima controversy which arose soon after the rebellion of the Jews against Hadrian, they call it a rebellion, that is, the Church historians, I am using it in that sense—Hadrian put it down—he did forbid the observance of the Sabbath, and naturally a lot of Christians, who were confused with Jews by the heathen, because Christianity had been born in Palestine and spread out though the Holyland to others parts, were often confused with the Jew. You will find it in the Apologies of Justin the Martyr, about the middle of the Second Century; you will find it in the Apology of Tertullian.

Q. What did they do to eliminate this confusion, the Christians?

A. The Churches were not able to do it. So each group was free to follow its own custom.

[fol. 143] For instance, Polycarp came over from Asia Minor, Anicetus was seated in Rome about the year 150 something, on the Quadragesima, they disagreed on it. One thought that they ought to hold the anniversary of Christ's death and resurrection on the 14th day of the first lunar month, because according to the Hebrew Calendar and the

New Testament time Christ was crucified about the time of the Passover, and regardless of whatever day of the week it might fall on, the Bishop of Rome decided, and some of his followers in other Churches in Palestine, that since Christ was crucified on Friday, lay in the tomb, resting there on the Sabbath, arose from the grave on the Sunday, it would be just as fitting to have it on the weekend following the new moon. So that custom prevailed.

There was no law forbidding it. There was no law commanding it. It was a Church festival, as I have said.

Q. Excuse me, sir. We have to limit this.

A. Yes.

Q. What is the position of yourself and your faith, the Seventh Day Adventists, with regard to a law which requires you to observe Sunday by refraining from work, and, if you need, give an explanation as to why.

A. Well, that is just exactly the point. That is the thing we have been talking about.

[fol. 144] It came to a head when the state in the person of the first Roman Emperor to be converted came over and sponsored one particular segment of Christianity, and Constantine issued six different Sunday laws, and I can show you in the books where they were.

Q. I do not mean to interrupt you, sir, but will you give me the answer first as to what your view is and then whatever explanation you may think appropriate.

A. I am speaking just a little bit high because I am partly deaf, and sometimes folks say if I get down to normal I can't be heard.

So if I am too loud, Your Honors, do not hesitate to admonish me.

Our principal objection is this, and we believe that it is Christian and historically American: That force, coercive, compulsory measures should never be used to compel any people to observe religious days under any pretext whatsoever.

We believe that that was the mistake that was made by Constantine, the six Sunday laws that set the precedent for it, because these things very often are like the camel's nose. If the state can step in and say, now, here are the Jews, and the Seventh Day Adventists, the Seventh Day

Baptists, the Seven Day Church of God, and a number of [fol. 145] others that I could mention—in Washington, D. C., we have two Moslem Temples where they observe Friday, or at least some of their followers do, because that is the day of assembly in the Moslem world. If the state steps in and dictates that everybody, regardless of creed or race or conviction shall rest upon that day, we feel, first of all, that the individual is being denied a God-given right to work six days, to do his work within six days; that that is in the commandment. Then another—

Q. What is in the commandment?

A. In the Fourth Commandment of the Decalogue: Six days shalt thou labor and do all thy work.

That we are denied that privilege.

Furthermore, an objection that we have is that after we have devoutly kept ourselves, paid our taxes to support this Government, to support these courts, to support these law enforcement officers, our Congressmen, our President, and all of that, we feel that it is unjust to compel us to observe the day of rest of another segment of Christianity, and be put in a category of second-class citizens.

In other words, we are being denied a privilege of laboring six days, whereas the other group can work the first five days of the week, and then open full-wide—and we [fol. 146] have no objection if they do it. But open full-wide on our holiday of rest and carry on.

We believe that under the law we are created equally entitled to just consideration, and any Sunday law that allows no exemption and provides nothing of the kind—as the Pennsylvania Sunday Law does—is an injustice, because besides denying us the God-given right of working six days a week we are compelled to lose one day out of every fifty-two weeks of the year of work, and therefore nearly 17 per cent of our income, and our children, our babies, our wives are just as precious in the sight of our Saviour and our God as the wives and children of others; they need to eat, they need their shoes. And why should we be placed in a category of second-class citizens?

If we keep our holy day we are penalized by being deprived of one day's work, one day's income; if we violate the law then we are fined up into hundreds of dollars and perhaps imprisoned.

So we regard this whole thing as unjust and we feel, furthermore, that it is wrong.

Christ himself enunciated the Golden Rule: Love thy neighbor as thyself.

Imagine that you were in some countries where I have labored, where today there is no freedom, where some of [fol. 147] my own church members are being put to death because in recent years—and I could name the countries but I don't want to jeopardize them here. Put to death because they refused to work on the Sabbath, because they refused to, because Christ said: Render to Caesar the things that are Caesar's and to God the things that are God's.

The seventh day is the Sabbath of the Lord thy God. Jesus Christ did not say the seventh day is the Sabbath of Caesar. Therefore, we believe that we have a duty, when it comes to common, ordinary holidays, instituted by our Government, as good law-abiding citizens, to observe them, but when it comes to trying to compel us to do otherwise than God has commanded we feel like Peter, that we are put in a very straight position, and we feel that everybody would feel that is unjust to treat us like that and not give us equal privileges with the others.

Now, in the District of Columbia

Mr. Kohn: I do not think we need that.

That is all.

You may cross-examine.

Cross examination.

By Mr. Rubin:

Q. Elder Odom, isn't the view of Seventh Day Adventists then that Saturday must be observed as a day of rest; is [fol. 148] that correct?

A. Yes, that is correct, and no body is received into our church membership who does not keep the Sabbath, because that is a fundamental belief, from sundown to sundown.

Q. Then it would be a violation of the principles of the Seventh Day Adventists for a person to work seven days a week and not observe any day?

A. It certainly would.

If a man in our denomination would be a Sabbath breaker we would labor with him, as we should, and try to help him to see his mistake. And if he persisted in it we would regard him as no longer being one of us, and we would disfellowship him, just as any church would anybody who did not abide by the beliefs, but we do not compel him; if he wants to leave us and go out, the exit is free, and so is the entrance.

Q. One more question and I am done. Is it also part of your belief that a person must work six days a week?

A. We do not believe that a person is compelled by God to work six days out of every week. We believe that provision is that within the compass of those six days we are given the God-given right to accomplish our work and that we should have it done when the end of the sixth day comes, so that we will not work on God's holy day.

[fol. 149] Mr. Rubin: That is all.

Judge Hastie: May I interrupt to ask one thing?

The Witness: Yes, sir.

Judge Hastie: In that view, do you object to the laws which declare the Fourth of July, New Year's Day, Memorial Day, and so on, holidays upon which certain labor is prohibited?

The Witness: Those we regard as Caesar's days, the days of the state, and we have that instruction from our Lord to render to Caesar the things that are Caesar's.

Judge Hastie: Even though that may restrict your period of labor to less than six days?

The Witness: And to cut down our income, because we feel that is our patriotic duty, to recognize a Government that gives us freedom and protects us in our right to work, and we love it. We love the Fourth of July.

Judge Hastie: I understand your position.

Mr. Rubin: That is all.

Judge Hastie: I am sorry. I wanted to get that clear.

Mr. Rubin: That is all I have, Judge.

Mr. Kohn: That is all.

[fol. 150] OFFERS IN EVIDENCE

Mr. Kohn: Will Your Honor indulge us for just a moment, sir.

If Your Honor please, I should next like to offer certain newspaper clippings, which consist of letters, editorials in newspapers in the Allentown area, of people who opposed what the plaintiff here was doing, on the ground that what he was doing was violating the tenets of Christianity.

I think that shows some indication of what the people in the community who support the Sunday observance laws think the purpose of that observance is. I think it is material for that purpose and I should like to offer a few sample clippings of that type.

Judge Hastie: Mr. Rubin.

Mr. Rubin: Well, we have to object.

I do not think Mr. Kohn would claim this is expert testimony certainly, and if at all it would have to come in on the idea of some mental state or some intent. I cannot see it. These are lay people—

Judge Hastie: I do not see how that bears upon the legislative purpose, which I suppose is the thing we are concerned with, are we not, Mr. Kohn?

Mr. Kohn: Well, I think it shows the consciousness of the community as to what they think their Legislature has done.

[fol. 151] Judge Hastie: I have serious doubt as to whether that is a matter that this Court should consider.

The objection will be sustained.

Mr. Kohn: If Your Honor please, just so the record will be complete—

Judge Hastie: Of course, you may identify some of them.

Mr. Kohn: Can I mark one or two exhibits, or take one letter and one editorial as typical?

Judge Hastie: Of course.

Mr. Kohn: I should like to mark as P-10 a letter in the Morning Call, a newspaper in Allentown, of November 5, Page 10.

(Newspaper clipping from Page 10 of Morning Call, November 5, was marked Plaintiff's Exhibit 10 for identification.)

Mr. Kohn: P-11, an editorial in the Evening Chronicle in that city of December 6, Page 12.

(Clipping from Page 12 of Evening Chronicle, December 6, was marked Plaintiff's Exhibit 11 for identification.)

Mr. Kohn: I should next, sir, like to offer in evidence as Plaintiff's Exhibit 12 some pictures which were referred to at another stage of these proceedings, showing our [fol. 152] activities, which I think can be stipulated took place on Sunday in Allentown, five pictures of bowling alley activities conducted on Sunday in the province of this District Attorney in Lehigh County during the period in 1958. It was agreed before that this was on a Sunday and I think we can do this without a lot of testimony if we stick to our previous stipulation.

Judge Hastie: If it is agreed among counsel that those are such pictures, I do not know whether it is or not.

Mr. Kohn: They will be P-12A, B, C, D, E.

(Five photographs were marked Plaintiff's Exhibits 12A, 12B, 12C, 12D, and 12E.)

Mr. Kohn: This, sir, would be P-13, pictures that have previously been marked in another stage of these proceedings.

(Four pictures, each containing twelve small prints, were marked Plaintiff's Exhibits 13A, 13B, 13C and 13D.)

Mr. Kohn: Plaintiff's Exhibits 13A to D are pictures showing activities in Lehigh County at a fair in that county.

Judge Hastie: Without objection they will be admitted. [fol. 153] Are those the pictures that were just presented to which you are referring?

Mr. Rubin: We would like to see the pictures.

Judge Hastie: Are those the County Fair pictures?

Mr. Kohn: Yes, sir.

You will note that they still have the reporter's markings from the prior part of this thing. They were taken intact from the record in the Court of Appeals to be reintroduced here.

Mr. Rubin: Your Honor, we do want to object to these pictures. If they are what we think they are, these are pictures of a Home Show that was held in Allentown at which no selling was done at all, and I think Mr. Kohn takes the position that the mere display may be in violation, and, of course, that is a legal point. We would admit them for the Court's consideration, subject to that objection.

Mr. Kohn: That is all right, sir.

Judge Hastie: Very well.

Mr. Kohn: I should like next to offer into evidence, the Biblical Concordance Reference from the King James Bible, which I showed to Judge Lord, but which is nowhere on this record. So if I may, I can just read it briefly. It states in the Concordance to the King James Bible that—

> [fol. 154] Sabbath: The Rest Day or seventh day of the week; Gen. 2:2, 3; became a Mosaic institution for rest and festal occasions;—

And then gives various sources in the Bible for that statement, which can be copied by the reporter.

> —Ex. 16:23-30; 20:8-11; Lv. 19:3, 30; 23:3; 25:4-9; Dt. 5:12-15; Day for Consulting Prophets; 2K 4:23; A day of teaching and joy; Neh. 8:1-12; Hos. 2:11;

And then continues:

> Among Christians of the Third and Fourth Centuries the day after the Hebrew Sabbath, the seventh day, gradually until well established was substituted for the Sabbath and called Sunday, the first day, in commemoration of the resurrection of Christ; also by some called Lord's Day;

And then it continues:

> Our Lord's mode of observing the Sabbath was one of the main features of his life which his Pharisaic adversaries most gladly watched and criticized.

Rather than offering this physically in evidence I just read that part.

It is the Concordance to this particular edition of the Bible, which we will identify further if you want it.

[fol. 155] Judge Hastie: Make sure the reporter has the edition.

Mr. Kohn: It is the A. J. Holman Company Bible of Philadelphia, copyrighted 1942, and this particular Page 129 of the Concordance at the end of the book.

May we have a 5-minute recess, sir. I think we may be able to put the better part of the remaining part of our case in by referring to depositions.

Judge Hastie: Suppose we have a 5-minutes recess and that will give you an opportunity to assemble your material.

(Recess at 3 o'clock p. m.)

Judge Hastie: Pursuant to the agreement of counsel the completion of the plaintiff's case will be postponed until tomorrow morning, and the defendant will be permitted to proceed with his case at this time.

Defendant's Evidence

Judge Hastie: Mr. Rubin.

Mr. Rubin: Thank you, Your Honor.

I would like to call Mr. George Hubschman as on cross-examination.

George Hubschman, having been duly sworn, was examined and testified as follows:

[fol. 156] Direct examination:

By Mr. Rubin:

Q. Mr. Hubschman, what is your occupation?

A. Store manager.

Q. For whom?

A. Two Guys from Harrison-Allentown.

Q. Is that a corporation?

A. Yes, it is.

Q. Would you characterize your duties generally as being that of the person in charge of the store?

A. That is correct.

Q. And that you would have the primary voice in Allentown in making store policy?

A. That is correct.

Q. When did Two Guys from Harrison come to Allentown, sir?

A. We opened the store in October of 1957.

Q. Was this your first store?

A. No.

Q. Anywhere?

A. No, it wasn't.

Q. Where else do you have stores?

A. We have stores throughout New Jersey, and also one store in Baltimore, Maryland.

Q. Is there any other store in Pennsylvania?

[fol. 157] A. No, this is the only one.

Q. So that you have one in Maryland, one in Pennsylvania, and the remainder of your stores are in New Jersey?

A. That is right.

Q. Are any of those other stores open on Sunday?

A. They all are with I believe one exception.

Q. Which one is that?

A. The Jersey City store.

Q. Why is it closed?

A. It is a downtown store.

Q. Is the one in Maryland open?

A. Yes, it is.

Q. Has it always been open on Sunday?

A. Yes, it has.

Q. When did it begin operations in Maryland?

A. About a year ago.

Q. Why did you select Allentown as a place to do business in Pennsylvania?

A. Well, I had spent quite a bit of time in Allentown and in the area and I was convinced that a store of our type would be a benefit to the community and, naturally, to ourselves.

Q. When you came to Allentown did you fully expect to remain open seven days a week?

[fol. 158] A. Yes.

Q. Did you have any reason to believe that you would not be allowed to remain open seven days a week?

A. No, none.

Q. Why didn't you?

A. Well, No. 1, I had spoken to the Township Commissioners, several of them, in the Township, about the old Sunday Blue Laws. They had informed me that they had never been enforced in the Lehigh Valley.

As I say, I had lived in Lehigh Valley for, oh, six years, and had been acquainted with the area for ten years previous to that, and had never heard of any effort to enforce that law.

Also the District Attorney had been reported in the newspaper as saying that he would not enforce the Blue Laws, approximately six months before we opened the store, and before we purchased our land.

Q. Was your belief that you would not have to close on Sunday a significant factor in your decision to locate in the Allentown area?

A. Yes, it was.

Q. Why?

A. Well, in our type of operation we are a so-called highway merchant, and we operate on a supermarket scale, with all our items in our store, and it is essentially a [fol. 159] 7-day a week operation.

Q. Would you have come into the Allentown area if you thought you would not be able to open on Sunday?

A. Probably not.

Q. Does that have to do with the economics of your operation or is it the geography?

A. The economics of our type of operation.

Q. Would you give us a short explanation of those economics?

A. Well, if we have to rely on high volume to cover our normal overhead, and accompanying small margin of net profit—

Q. How much of your net profit is dependent on your Sunday operations?

A. Well, practically—well, all of it actually. We operate about 1½ per cent net profit, and we naturally have to rely on a high volume to offset our overhead, and unless you are able to run at that volume, a certain predetermined figure, why, naturally, you will have no net profit.

Q. In calculating your overhead is there is a significant addition to your overhead by remaining open that seventh day?

A. No, no, that is the reason I say we are a supermarket type of operation. We have no large staff of sales help; our labor is not a high item in our overhead picture.

[fol. 160] Q. So that Sunday then assumes great significance to you because you can defray your seven days of overhead really, to a large extent, by your volume on Sunday.

A. That is correct.

Q. Would it then be fair to say as a result of this that you came into Allentown and located there as the result of a belief that you could operate in violation of the law and that that law would not be enforced against you?

A. Well, we felt, and myself, I felt that the law hadn't been used in, I don't know how long, but as far as the memory of the people that I talked to, as I said, in this instance, the Township Commissioners whom I approached, because we are located in the Township, that none of them had ever recalled any action on the Sunday Blue Laws, and that it was just practically abandoned.

Q. So that you did then come into Allentown fully intending to violate the Sunday law, apart from the enforcement?

A. You put me in a very nice position there. I mean so far as the violation of a law that was not being enforced.

Q. But it is a law.

Mr. Kohn: Well, I think it is agreed that he came in intending to open on Sunday.

Judge Hastie: And with knowledge that the law was on the books.

[fol. 161] Mr. Rubin: All right.

By Mr. Rubin:

Q. I believe you stated a few minutes ago now that you could not remain open economically if you were forced to close on Sunday; is that correct?

A. That is correct.

Q. If you were satisfied that all merchants, all persons in your category, were closed on Sunday would you have closed on Sunday or would you have persisted in remaining open?

Mr. Kohn: May I ask what you mean by, in his category?

Mr. Rubin: Let me say those persons engaged in retail selling on Sunday.

Judge Hastie: I did not hear the exchange, Counsel, I am sorry.

Mr. Kohn: I said would he mind telling what he meant by "in your category"; I was not clear what he meant.

The Witness: Well, the original Sunday Blue Law, as I understand it, prohibits all worldly employment except acts of necessity; it does not state that you cannot sell goods on a Sunday. And our position has been if that law were applied against everyone, the cement mills, the [fol. 162] steel mills, when they are running, all matters of activity that actually are covered under that law, then we would have no choice but to comply with it.

By Mr. Rubin:

Q. Even though that would mean that you would really have to go out of business?

A. Well, that is—yes, I would say so.

Q. Do you close at all during the year, Mr. Hubschman?

A. Yes, sir; we do. We close on Christmas Day, Thanksgiving Day, Easter Sunday, and New Year's Day. Four days a year.

Q. You did not close on Yom Kippur, did you?

A. No, we did not.

Q. How about Rosh ha-Shanah?

A. No, we did not.

Q. Did you ever?

A. No, we did not.

Q. Are you open on Saturdays?

A. Yes, we are.

Q. Every Saturday unless it falls on one of those four secular holidays?

A. That is correct.

Mr. Rubin: That is all.

By Mr. Ritter:

[fol. 163] Q. Mr. Hubschman, were you aware of the law of the Commonwealth of Pennsylvania when you opened this store?

Judge Hastie: He has already answered that, yes.

By Mr. Ritter:

Q. You say you talked to the Township Commissioners in Whitehall Township?

A. That is correct.

Q. Whom did you talk to?

A. Tom Davies and the other Mr. Davies.

Q. Anyone else?

A. I believe I discussed the matter with the whole—

Q. Did you talk to Mr. Ribello Bertoni?

A. I believe the whole question was discussed at a meeting that I attended with them. I had also previously discussed it with Tom and Amos Davies, and then I discussed it with the Commissioners as a whole before we purchased the land on Seventh Street.

Q. Did you talk to Ribello Bertoni, who is a Commissioner?

A. I said I talked to all of the Commissioners.

Q. Specifically with Ribello Bertoni?

A. Yes, he was present.

Mr. Kohn: Just a minute, please.

Judge Hastie: Counsel, you are not giving the witness [fol. 164] an opportunity to answer your question before you ask the next.

The Witness: Mr. Ribello was present at the meeting. I can't recall whether I actually sat down face to face with him. We were all around a table and it was a general discussion of conditions. Now, who actually said what, I would not be able to recall.

By Mr. Ritter:

Q. Was Nevin Fritzinger around, another Commissioner?

A. Yes, he was.

Q. Did they discuss the law with you at that time?

A. I believe it was mentioned, and it was also stated by, I believe it was Tom, that he had no recollection of that law ever being applied in the Lehigh Valley.

Q. Did you talk to the State Police of that area?

A. No; I did not.

Q. (Continuing) Relative to the law?

A. No, I did not.

Q. Did you talk to the District Attorney, the then District Attorney, Paul A. McGinley?

A. No, I did not.

Q. Did you talk to the predecessor of the District Attorney, that is, to Attorney Jack Morgan, who was a prior district attorney?

[fol. 165] A. No, I did not.

Q. Did you talk with the State Attorney General relative to whether he would enforce the Act of the Commonwealth?

A. No, I did not.

Q. Mr. Hubschman, you are the manager for Two Guys from Harrison in the Allentown area, are you not?

A. That is correct.

Q. To what extent did you do newspaper advertising in our locality which was critical of the District Attorney?

A. May I have the question again. I couldn't hear, something was pounding.

Mr. Ritter: Will you repeat the question.

(The last question was repeated by the reporter.)

The Witness: We took three pages—three full-page ads as I recall.

By Mr. Ritter:

Q. And they were solid pages of the newspaper, were they not?

A. That is correct.

Q. And who prepared those ads for the store?

A. I was mostly responsible for them.

Q. You. Were there any other individuals?

A. Yes, I was consulted, with my attorneys.

Q. Will you tell the Court how many times these full-
[fol. 166] page ads were put in the paper criticising the District Attorney's office for enforcing the law?

A. Well, I believe there was only one that you could call criticising the District Attorney, if you could call it that. The others were more or less our position on the situation as it existed.

Q. Do you have copies of the advertisements that you put in the newspapers?

Judge Hastie: No objection has been made by the other side. The Court would like to know what relevance this line of inquiry has to any issue which is before the Court.

Mr. Ritter: If the Court pleases we will show that they entered the County deliberately intending to violate the laws of the Commonwealth, and to that extent they published newspaper articles.

The Court: It has been established and frankly admitted that the business was opened with knowledge of the law. What more is useful? Isn't anything just repetitious after that?

By Mr. Ritter:

Q. Mr. Hubschman, do you claim that the District Attorney discriminated against your establishment in North Seventh Street?

A. That is correct.

[fol. 167] Q. Will you tell us why you think so?

A. Because we were arrested for operating on a Sunday and practically no one else was.

The District Attorney is making token arrests spasmodically; with a few other operations, but we were arrested every week, and we were also arrested for conspiracy; myself and three or four others in the store were arrested for conspiracy and were actually scheduled for criminal court.

Q. Mr. Hubschman, you are acquainted with the business area in Allentown, are you not?

A. Yes, I am.

Q. You say the District Attorney was discriminating against you; first of all, let us go to the Hamilton Street

area, which extends roughly from the Lehigh Valley Railroad tracks, going west on Hamilton Street, to about Twelfth, or even beyond that, to Fifteenth Street. Will you tell the Court what stores in that approximate 12-block area were operating on a Sunday when you came to Allentown.

A. Well, it is the downtown area and, as is true in most locations, your downtown areas are closed, with the exception of stationery stores, drug stores and some smoke shops on Hamilton Street, and also some candy shops that are open and also sell gifts as well as candy.

Q. Can you pinpoint the stores that were open in this [fol. 168] Hamilton Street area that you are discussing now?

A. Yes, there were two smoke shops, one at the corner of Sixth and Hamilton Streets; there is another smoke shop on Ninth, Tenth—Tenth or Eleventh Street and Hamilton, I believe it is Eleventh Street; you have a Dolly Madison Shop that sells dolls, along with ice cream and candy, and they also have a selection of gifts that they sell on a Sunday.

I believe the Loft Candy store on Hamilton Street and Eighth Street, that store is open on a Sunday and selling gifts along with candy. The same way with the Planters Peanut Shop on Hamilton Street, I think it is between Eighth and Ninth on Hamilton Street, that is open, and they also sell again gifts, small items on a Sunday.

I am not too familiar with lower Hamilton Street.

I would venture a guess that would be the stores that would be open on a Sunday today.

Q. Did you yourself visit any of those stores on a Sunday and make any purchases?

A. Yes, sir.

Judge Welsh: Would the number of stores open on Sunday vary from time to time, prior to your arrest?

The Witness: What time is that, sir?

[fol. 169] Judge Welsh: Prior to your arrest, would the number of stores that were open in your area vary from time to time, the stores that would keep open?

The Witness: No, sir, the same type of stores would be open. We are talking about just Hamilton Street.

Judge Welsh: Yes. In that period.

The Witness: In the downtown area.

Judge Welsh: Yes.

The Witness: Yes, it would be the same stores.

Judge Welsh: Thank you.

By Mr. Ritter:

Q. Now, the stores that you have referred to are small cigar stores and candy stores, is that correct?

A. On Hamilton Street, yes.

Q. On Hamilton Street?

A. Yes.

Q. (Continuing) That were open on a Sunday.

Now, there are on Hamilton Street a number of department stores—Hess Brothers, Ninth and Hamilton Streets. You are acquainted with that store?

A. Yes, I am.

Q. Did you ever find that open on a Sunday?

A. No, I did not.

Q. Also on Hamilton Street is Parr's.

[fol. 170] A. That is a shoe store.

Q. They sell shoes?

A. That is right.

Q. Purses, stockings, toys, do they not?

A. Yes, they do.

Q. As a matter of fact, they sell quite a few items at Parr's, do they not?

A. Well, besides the items that you mentioned I can't recall.

Q. It is rather a large store, it occupies about a half a block running in depth along Eighth Street, does it not?

A. Half a block running in depth?

Q. Yes.

A. Yes, all stores do in that area.

Q. Were they ever open on a Sunday that you observed?

A. No.

Q. Zollinger & Harnett is also another department store on Hamilton Street.

Judge Hastie: Can counsel cut this short by asking the question whether any of the department stores in the Hamilton Street area are open on Sunday?

The Witness: No, sir, none of them are.

By Mr. Ritter:

Q. Going to the Seventh Street area, there is a Seventh [fol. 171] Street business area, too, isn't there, that extends from Hamilton Street northward about three blocks?

A. It extends further than three blocks. It extends out to Tilghman Street.

Q. All right, and that is approximately five or six blocks, is that correct?

A. That is correct.

Q. Do you find any department stores open on Seventh Street on a Sunday?

A. There is one department store on Seventh Street, and that is the Sears Roebuck Store. That is the only one and they are closed on Sunday.

Q. Are you acquainted with Shain's Furniture Store?

A. Shain's Furniture Store?

Q. Yes.

A. No, sir, I am not.

Q. There is also a ladies' shop on Seventh Street, is there not, which is a department store—

A. I would not call those stores department stores?

Q. You don't recall those stores?

A. No.

Q. There is also a paint store at Seventh Street. They were not open, were they?

A. You asked about department stores.

[fol. 172] Q. Would you say that your store was the only one where proceedings were taken to arrest your employees?

A. (No answer.)

Q. Are you acquainted with Bause's Drug Store on the Seventh Street Pike?

A. Which is—

Q. Bause's Drug Store. Bause's?

A. No, I say I missed your question in the beginning. Would I say what?

Q. That your employees were the only ones arrested on a Sunday?

A. I said plus certain exceptions at other places where they were arrested spasmodically.

Q. Now, will you tell the Court what other places you know of where employees of theirs were arrested for Sunday selling.

A. Right after we opened the store and they started to arrest our employees they did make arrests at Nestor's Sporting Goods Store, Bause's Drug Store, Coplay Discount Fair, the Bargain Center; several other places. Most of them closed up immediately after being arrested. This was right before Christmas, because our store opened in October.

However, in January, as I tried to say before, most of them reopened, with the exception of Coplay Discount Fair did not reopen. The other stores did reopen and stayed [fol. 173] open for a period of about six or eight months. During that time there were token arrests made on selected Sundays only, and during this time we were being arrested every Sunday.

Judge Welsh: Mr. Hubschman, did you ever have any conference among you businessmen in a similar line as to closing on Sunday or keeping open on Sunday? Was it the result of an agreement or anything of that kind?

The Witness: No, sir, not a discussion as such. I had visited several places at the start of this affair. I spoke to the owner of Nestor's Sporting Goods Store, more or less inquiring what he planned to do after he had been arrested once and he frankly told me he didn't know. Dan Bause of Bause's Drug Store was also more or less undecided. And that was the extent of our discussions as a group. We had tried to form a—

Judge Welsh: Reference has been made to Hess. Is the name Hess?

The Witness: Hess Brothers.

Judge Welsh: Did you folks have any conference with Mr. Hess at any time prior to your arrest as to keeping open on Sunday, the policy and so forth?

The Witness: No, sir. We wouldn't have.

Judge Welsh: You went your way and they went theirs?
[fol. 174] The Witness: Yes, sir
Judge Welsh: All right.

By Mr. Ritter:

Q. You say that some of those places reopened in January?

A. Yes, sir.

Q. Isn't it true, Mr. Hubschman, that when they reopened in January their employees were again arrested?

A. To the best of my knowledge they were arrested, but not every Sunday.

Q. They were arrested, but not every Sunday?

A. Yes.

Q. Were they arrested every Sunday they were open?

A. No, they were not arrested every Sunday they were open.

Q. Can you pinpoint any Sundays when they were open and they were not arrested?

A. I believe we have the records of that. I don't have them with me, but I am sure the shoppings that we made, we had given you a list of them on various Sundays, that they were open, and to the best of my knowledge they were not arrested on those Sundays.

Q. When you came to Whitehall Township approximately how many stores in Whitehall Township were doing business on Sunday?

A. Well, the whole Seventh Street Pike was open and [fol. 175] doing business on a Sunday.

Q. Wasn't that true that they were open and doing business after you arrived in Allentown? I am asking you when you came to Allentown how many were open on a Sunday.

A. They were all open on a Sunday.

Q. You say they were all open before you came into Allentown?

A. Yes, sir.

Mr. Kohn: That is objected to, sir. He has answered the question at least twice. It is repetitious.

Judge Hastie: Proceed.

Mr. Ritter: I would like to have it qualified, Your Honor. I know that they were open after he came to the store in Allentown, but I wanted to know about before.

Judge Hastie: The witness has said that the stores were open before he came.

Mr. Ritter: That is correct.

By Mr. Ritter:

Q. And which ones?

A. Jordan Pen Factory was open; the Patio Shop on Seventh Street, across from Penn Fruit, was open on a Sunday; Bause's Drug Store was open on a Sunday; the Anchor Building Supply was open on a Sunday; the Wayside Furniture was open on a Sunday; the Fullerton Furni-[fol. 176] ture Galleries were open, they still are, on a Sunday, the lumberyard up the road, Whitehall Building Supply, was open on Sundays.

That is about all I can recall at this point.

Q. Mr. Hubschman, isn't it true that those stores after opening on a Sunday, that is, following your arrival in Allentown, all closed down upon the request of the District Attorney?

A. No, not all of them.

Q. Some did?

A. Not all of them closed.

Q. Will you tell the Court, please, which ones did not close down after being requested to do so by the District Attorney? I would like to make a list of these.

A. On which Sunday?

Q. On any Sunday.

A. On any Sunday?

Q. That is correct.

A. Bause's Drug Store remained open, selling non-drug items, and we have a whole list of those.

Q. On drug items, is that correct?

A. I say selling non-drug items. We have submitted lists of these. I can't recall them from—

Q. From your memory you tell the Court which ones were open.

[fol. 177] A. Bause's Drug Store; Allen Wayside Furniture was open; the Fullerton Furniture Gallery was open, Pete Nestor's reopened.

Do you want to confine this to the Seventh Street Pike?

Q. That is correct, in your area in this Township.

A. I believe Anchor opened up for several Sundays, but then closed up again. I am not quite sure of that. The Raymond's Patio Shop.

Q. The Patio Shop?

A. Raymond's Patio Shop. There are two Patio Shops. The one Patio Shop reopened, that was Hummell's Patio Shop, and then Raymond's was open—they are seasonal, they are only open during the summer, but they were open every Sunday.

Mylander's Florists was open. Also sells lawn equipment and lawn mowers. That would be all I can recall at the moment that were open on the Seventh Street Pike or in the immediate area of Seventh Street.

Q. Do you know of any sales made at the Fullerton Furniture Gallery?

A. Yes, sir.

Q. When?

A. I sent one of my shoppers to the Fullerton Furniture Gallery previous to the hearing that we had here, oh, I [fol. 178] guess about a year ago or less, I forget the date, and she purchased a $300 sofa on that day.

We had in our possession the receipt for that. It was postdated, but it was purchased on—

Q. Isn't it a matter of fact that that purchase was made on a date after Sunday; I think that was a Tuesday that that sofa was sold.

A. Mr. Ritter, if you recall, the date that was shown on the receipt, we had purchased it on a Sunday, and Tuesday morning we were here in court, and the date on the receipt was dated for Tuesday morning, and it would have been a physical impossibility to be here in court at 9:30 with a receipt dated for that day having been purchased in Allentown.

What had happened, when the woman went in, that I sent in with her husband, they bought this sofa, placed a deposit on it, and the clerk postdated it from Sunday to Tuesday.

And just recently, oh, on the 8th or 6th of September we visited the shop again, and my wife purchased another sofa there on a Sunday, and it is very easy to postdate these receipts.

Judge Welsh: Was there any prosecution on a general scale for violation of this Sunday law before you were arrested?

[fol. 179] The Witness: Before we were arrested?

Judge Welsh: Yes.

The Witness: No, sir. Never, never.

By Mr. Ritter:

Q. Mr. Hubschman, isn't it true that the employees of Bause's were not only arrested for Sunday sales but they were also arrested on conspiracy charges?

A. I don't know, sir. I read in the paper that they were supposed to be served on the conspiracy, but as far as I know we were the only ones that were remanded to court. I never heard of anybody else being scheduled for a criminal court proceeding besides myself, Freddy Shugot and Dorothy Barnowski.

Q. You did read in the paper they were arrested for a conspiracy charge?

A. No, sir, all I read in the paper was that their names had been taken for preparation of conspiracy charges.

Judge Hastie: I suppose the Court is not interested in what the witness read in the press, but only what he has knowledge of.

The Witness: Well, I don't know, sir, I would have no way of knowing.

By Mr. Ritter:

Q. Do you know that Nestor's were also arrested for conspiracy charges or on conspiracy charges?

[fol. 180] A. That is the same thing. I wouldn't know.

Q. Both Bause's and Nestor's, you don't know?

A. No, sir.

Q. Is it also true that every place that you mentioned here, Bause's, Wayside Galleries, Fullerton Furniture Galleries, Nestor's, the Patio Shop, Raymond's Patio Shop,

and the others that you mentioned, they were all arrested from time to time for Sunday violations?

A. No, sir, the Fullerton Furniture Gallery, according to what I read in the paper—that is the only way I can find out who has been arrested and who has not.

Judge Hastie: Just answer as to what you know or do not know about their arrests.

The Witness: Well, I would have no way of knowing. I am not a police officer, sir.

Mr. Ritter: I am through, Your Honor, but the Attorney General's office—

Mr. Rubin: I have a few questions on one point, sir.

Judge Hastie: Go ahead, Mr. Rubin.

By Mr. Rubin:

Q. Mr. Hubschman, what would your estimate be of your total volume of business, gross sales, in the course of a year?

A. Approximately twelve million dollars.

[fol. 181] Q. About how much of that gross is on Sundays?

A. About 28 per cent. It depends on the time of the year.

Q. As I recall, you originally filed a complaint in this action a little less than a year ago; wasn't that correct? It was in November, I believe, 1958.

A. Yes; yes.

Q. And in that complaint you were attacking the 1939 statute, which was the only one then being enforced.

A. I believe so.

Q. At that time you had been subject to arrests under that statute for some months, hadn't you?

A. I believe it was approximately a month. Wait a minute. What year was that?

Q. This is November of 1958.

A. November of 1958 would have been one year.

Q. One year.

A. That is right.

Q. What caused you to wait that year before bringing this action?

A. Well, up until that point we were being arrested under this 1939 Blue Law. At that point the District Attor-

ney's office threatened us with these conspiracy charges that we would face two years in prison and fines up to a thousand dollars. Naturally our help, the employees of the store, [fol. 182] were very, very concerned about it, as, naturally, I was also.

Q. So that the motivation for bringing this suit in November of 1958 was the then threat of the conspiracy prosecution?

A. That is correct, yes.

Q. The enforcement of the 1939 Act itself and the payment of those fines—by the way, did the store pay for the employee's fines?

A. I have no idea.

Q. You don't know?

A. I don't know.

Q. Would you say that the enforcement of that Act itself, absent conspiracy prosecutions being threatened was working irreparable injury upon you?

Mr. Kohn: That is objected to.

Mr. Rubin: I will rephrase it, Your Honor. Maybe Mr. Kohn will like it better this way.

By Mr. Rubin:

Q. Was the enfofcement of that Act causing such a detriment to your business that you felt you would have had to close on Sunday if that 1939 statute had continued to be enforced against you?

A. I would have to qualify the answer there. It was getting pretty rough. I mean we were in aldermen's hearings [fol. 183] every night of the week practically. I wouldn't go so far as to say we would have to close on account of it, but our time was taken up tremendously with this problem, and also—

Q. How many employees do you have approximately?

A. Now?

Q. Well, at that time.

A. At that time in November we would have had approximately 300 employees.

Q. Were they all being arrested every Sunday under the Act?

A. No.

Q. About how many were being arrested? Was there a pattern?

A. At which time?

Q. During the year of 1958.

A. Well, it would depend whether it was before Christmas or not. Before Christmas then the District Attorney would make wholesale arrests.

Q. I am just dealing with 1958.

And, of course, you restrained the District Attorney in November of 1958.

A. That is right. And then the restraining order was lifted.

Q. What?

A. The restraining order was vacated.

Q. Yes. When was that vacated?

A. It was the next week.

[fol. 184] Q. At any rate, at the Christmas Season, more were then arrested?

A. Wholesale arrests were made. Anybody that they could find they arrested.

Q. But before that what was the normal pattern?

A. Ten a week.

Q. So that during most of the year 1958 the arrest of ten a week wasn't a sufficient detriment to cause you to close down or to think of closing down.

A. During 1958—in fact, we still have hearings that have been continued since October and November of 1957. We would have sixty and seventy people at the alderman's office, cases being heard, and we would get through two or three, and, as I say, there are still cases yet to be heard, and all through 1958 we were still hearing cases from the first month or two of the arrests.

Q. Now, when you say sixty or seventy persons would appear at the alderman's hearing, and yet ten were being arrested, why is this?

A. I say sixty and seventy at the beginning of this arresting would appear in an alderman's office, two or three cases would be heard, the rest would be continued, and then we would have to go back and hear a couple more cases, and still keep going back and back.

[fol. 185] Q. Why were they continued?

A. The pressure of time.

Q. What do you mean?

A. Well, it would take so long that the alderman would decide to adjourn for the evening.

Q. Were any of the continuances at the request of the counsel for your employees?

A. I don't believe so.

Judge Hastie: What is the relevancy of this?

Mr. Rubin: There really is not, Your Honor. I want to go back to this one point.

By Mr. Rubin:

Q. It is true then that you did continue to operate all through 1958 until November, while the Act was being enforced against you?

A. That is correct.

Mr. Rubin: That is all.

Cross examination.

By Mr. Kohn:

Q. Mr. Hubschman, were there other activities that were open, without prosecution, in Lehigh County, both before and after you came into the County, including such things as cement factories?

[fol. 186] A. Yes, sir.

Q. Truck manufacturing plants?

A. Yes, sir.

Q. Amusement parks?

A. Yes, sir.

Q. Golf courses?

A. Yes, sir.

Q. Swimming pools?

A. Yes, sir.

Q. Bowling alleys?

A. Yes, sir.

Q. Florists?

A. Yes, sir.

Q. Automobile appliance shops?

A. Yes, sir.

Q. Gasoline stations?
A. Yes, sir.

Mr. Kohn: That is all.

[fol. 187] Judge Hastie: Go ahead with your next witness.
Mr. Rubin: Paul McGinley.

PAUL A. MCGINLEY, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rubin:

Q. Mr. McGinley, do you presently hold a public office?
A. I do.
Q. What is the office?
A. District attorney, Lehigh County.
Q. When did you first become the district attorney of Lehigh County?
A. January 2, 1956.
Q. Before you became district attorney of Lehigh County what was your knowledge, what was your experience personally with the Pennsylvania Sunday Laws?
A. My earliest recollection was when I guess I was about eight years old, when I read, or was very interested in baseball, and knew about the baseball case in Philadelphia, and I think within a year or two later, in 1925, there was a hearing concerning the Sesqui-Centennial operation in Philadelphia.

That is about as far back as I can go personally.

Q. Were you familiar generally with any Sunday operations in Lehigh County prior to your becoming district attorney?

[fol. 183] A. Well, I knew that there were parks open, such as Dorney Park, which is an amusement park, rides, and some factories were not closed on Sunday, as cement mills, and Mack Motors, and one or two others. Generally speaking, though, most places were closed.

There were a few of the usual corner grocery stores which operated to sell bread and milk and so forth on a Sunday, when a family would run out.

Q. How about in Whitehall Township?

A. I believe that there was practically nothing operating in Whitehall Township at that time. There may have been a few grocery stores. But that would be all.

Q. Were you ever personally aware, as an attorney, of any case, or were you ever personally involved in any case involving the Sunday laws prior to your becoming district attorney?

A. No.

Q. When you became district attorney what was the situation in Lehigh County with the Sunday laws, as you recall it, or if you have any recollection?

A. Well, everything was very quiet. We have a rather quiet community. The stores on the main street were closed, the stores in the outlying areas were closed.

As I say, there were a few corner grocery stores who catered strictly to food items, who were open for necessi- [fol. 189] ties, as I would understand it; food, milk, bread, things like that.

Q. Do you recall when the plaintiff, Two Guys from Harrison, opened its store in Lehigh County?

A. I believe it was during the fall of 1957.

There were announcements in the newspaper and actually I had seen this building, it was a very impressive operation, coming into being, and I think I even went up in that area on one occasion and just walked around and saw what kind of an operation it was. And found that it was a tremendous store, and frankly I welcomed it to the community, because I knew nothing about what was to transpire as far as Sunday sales were concerned.

Q. Without my asking you specific questions at this point would you please tell the Court then the situation that developed at the time of the opening of the plaintiff's store until Christmas of that year; that would be the fall of 1957.

Mr. Kohn: That is objected to as being too vague, sir, the situation that developed.

Judge Hastie: The situation with reference to what?

Mr. Rubin: I would like him to explain the problems that the district attorney himself as the district attorney had.

Judge Hastie: The problem of law enforcement?

[fol. 190] Mr. Rubin: That is right.

Judge Hastie: The problem of enforcing the Sunday law from that time on.

Mr. Rubin: Yes, sir.

Judge Hastie: Very well. If you limit it in that way it will be permitted.

The Witness: We had no problem prior to the opening of the plaintiff's store. There was in the entire time, almost a year in my office as district attorney I had not heard a single complaint about any retailing on a Sunday, and my personal observation was that there was very little, if any, retailing, as I say, with the exception of a few gas stations and grocery stores and so forth.

Suddenly, however, I began to notice by the newspaper that there were marches on City Hall; various groups, labor groups, merchandising groups, Chamber of Commerce, and mass meetings were being held, and even as of that time my office had received no complaints. But after these engendered for a few days and continued, and I read them with interest in the newspaper, I could see a storm beginning to blow up.

We then suddenly began to be practically deluged by telephone calls from every segment of the community as to whether we were not going to enforce the Sunday laws.

I also noticed that the merchants on the North Seventh [fol. 191] Street Pike in this township, Whitehall Township, began to open on Sundays, and I noticed that some of the stores on the main street of the City of Allentown began to make known through newspaper publicity that they were going to be open on Sundays, too.

There were, as I say, mass meetings of the merchants, there were meetings of religious groups, there were marches on City Hall, meetings of labor groups, and they began to insist that the law be enforced.

Strangely enough, the first thing they did was to go to City Hall, when, as a matter of fact, I suppose they should have gone to our office, the County Office. But it began to be apparent that law and order in the community was breaking down, and we decided that we had this law, and whether we liked it or not we had to enforce it.

By Mr. Rubin:

Q. What caused this sudden shift in the atmosphere in the community? Did anything happen at that time?

A. Well, I believe that it was the opening of the plaintiff's store and everybody else, apparently in self defense, began to open also.

Q. What did you do as a result of this, what you termed break down, or potential break down of law enforcement?

A. I let it be known through the public press and by oral [fol. 192] invitation, since time was short, that there would be a meeting in my office of all the law enforcing officials of the county.

Those invitations were made on December 3rd and 4th, I believe, and the meeting was to be held on Thursday, the 8th of December, 1957.

At that time there was present in our office representatives of practically all of the municipalities, townships, boroughs, and the cities—West Bethlehem, the City of Bethlehem, the City of Allentown, various municipalities—and we called to their attention the fact that this problem had now arisen and we felt we had to do something about enforcing the law.

As I say, it became apparent that law and order was breaking down and these mass meetings made us more aware of it than we may have been otherwise. There were newspaper articles and so forth and so on demanding that the policing officials do something.

Q. Mr. McGinley, let me break in with one or two questions here. So that the Court can have some idea of how the operation of your office goes on, what is the personnel in the District Attorney's Office in Lehigh County?

A. We have four attorneys in our office; the district attorney and three assistants; we have four stenographers [fol. 193] or secretaries; and we have two county detectives.

Q. And the job of the county detectives primarily is what?

A. Their job primarily is to investigate complaints and bring prosecutions wherever it apparently becomes necessary.

Q. Would you say, based on your experience as a district attorney in Lehigh County, that it has been either possible

or a fact that every known crime committed in Lehigh County has resulted in a prosecution?

Mr. Kohn: That is objected to.

The Witness: Of course, that would be impossible.

By Mr. Rubin:

Q. Going back then to your meeting of December 8th, would you describe the meeting itself?

A. The meeting was attended by, as I say, the law enforcing officials, including the state police representatives, the police from the various municipalities, solicitors from the various townships and cities. I don't believe all were present, but in most cases they were present.

I think there were people from the Chamber of Commerce there. I think there were a number of lawyers there who represented various merchants in the area; including one of the attorneys from the plaintiff, and at that time we explained to them that we felt that the law should be en- [fol. 194] forced, because it appeared that things were breaking down and the law had to be enforced, and we tried, by going over the various cases that had been decided on this issue, to try to point them the way of attempting to see that the law was enforced, and I asked their cooperation, and, by and large, in the great majority of cases, we received their cooperation.

Q. When you say "cooperation," what specifically was done?

A. Well, the fact that they promised—or didn't promise, but when they left the meeting we I believe were of the feeling that we anticipated that they would be vigilant and ask people to close their stores if they were in violation, other than the necessities which had been indicated by the cases which we tried to point out to them. And we felt we were going to be able to expect that they would enforce the law.

Q. What happened after the meeting?

A. Well, after the meeting—of course, that was on a Thursday. Do you mean what happened on Thursday or the following Sunday?

Q. No, the following Sunday.

A. Well, between Thursday and Sunday we had—I had a telephone call from the chief of police of Whitehall Township, Mr. Kline, and Mr. Fritzinger, who was in charge of policing in that township, asking permission to come to my [fol. 195] office on Saturday and to lay a plan by which the area of Whitehall Township could be policed the following day.

I told them we were very happy to cooperate, and when they came to the office they explained that they would have a limited number of people; they indicated they had made a sporadic count of the number of merchants who were open on Sundays and found that at that time there were about a hundred merchants in that particular township open for merchandising, and they asked our office if we would be cooperative in sending personnel up to that township.

We told them we would. I believe they said they would have six people available. They asked us to come there on Sunday morning, the 8th, and to try to brief the personnel who were going to take part in this attempted enforcement of the law.

Q. Was this Mr. Fritzinger, the same Commissioner Fritzinger that was referred to in the—

A. Yes. Yes, Mr. Nevin Fritzinger who has been a township supervisor or commissioner for many years up there.

Q. What happened on that Sunday?

A. On Sunday I had advised my county detectives, in company with personnel from Whitehall Township police, to begin at nine o'clock Sunday morning, and to go throughout the township, which was mostly up and down what we [fol. 196] call the Seventh Street Pike, and visit the various merchants and ask them to cooperate.

Of course, there was a great deal of newspaper publicity being given to this entire matter and they went up and down that morning, starting at nine o'clock, and I think were able to meet with practically everybody who had opened along the Seventh Street Pike. There were several stores which did not open until later in the day. The plaintiff opened at noon I believe and Coplay Discount House was to open at one or two o'clock in the afternoon.

We met with the police officers at the police station in the township on their invitation at 11:30 in the morning

and there we assigned police to the various areas, some of whom we asked to go with us and others we asked to go elsewhere.

I told them that I would go to the plaintiff's establishment for a while and then go to the Copley Discount House.

There were several—I think two teams went to Two Guys From Harrison, and the others were dispersed throughout the township.

We got compliance—we found, when we went around, of this hundred or so, all but six places had decided to close, and we took names at all of those establishments and ar- [fol. 197] rests followed the following day. We could not arrest on Sunday, but arrests followed the following day, on Monday.

After being at the plaintiff's establishment for about an hour I went to the Copley Discount House. They were—that is another rather large operation. They were waiting for us and they had some conversations with ownership in New York, I believe it was, and then they decided to abide by our request and to close their—and stay closed, which they did, and they have abided by that ever since—in the plaintiff's establishment, when we went in, we, of course, kept—tried to keep the thing from taking on any kind of a circus atmosphere. We were met very cordially by Mr. Hubschman and Mr. Efron and Mr. Josephs, and they invited us to come into their office.

We went there and we said, of course, it is no mystery to you why we are here; we would like very much if you would comply with the Sunday closing laws.

And they said that they had received orders from management that they were to remain open, and they told us, however, that they would be cooperative to the extent that they would and had instructed all of their employees to give their names and addresses as the police officers went through the establishment and spoke to them, and they did that. I think there were maybe 300 or 350 employees [fol. 193] there that day.

We instructed the groups not to go into the food areas, and the restaurant area, and the drug area, areas which had been indicated by the courts in prior decisions to have been necessities. No one was approached in those areas. We

went into areas like the television, where they were selling television sets and refrigerators and appliances, gas stoves, clothing, shoe stores, and things like that.

And there were I think 70 some odd names taken out of the 350 who were there that day.

Q. Now, you yourself were present, is that true?

A. Yes.

Q. In Whitehall Township?

A. Yes.

Q. Was a similar survey and were similar arrests being made elsewhere in Lehigh County? A. Oh, throughout the entire county.

The Mayor of the City of Allentown had at our request appointed Captain Sperling to be in charge of the enforcement in the City of Allentown. Later in the day he informed me that there were a few places open, arrests were made, and subsequently they were—they weren't made the same day, they were made the following day. One very large discount house on the outskirts of the city, by the [fol. 199] name of Auburn Fair, agreed to close, and did close, and another discount house, by the name of Bargain Center, was asked to close, did not close, and I think there were arrests made of most of their personnel the following day. However, within a week or two they closed also.

I might say that in Whitehall Township the six who had refused to close the day we were there; the following Sunday all closed, the only one which was still open was the plaintiff, and in spite of repeated requests to abide by the law they refused. There was one exception, if it may be called an exception, that was a place called Fullerton Furniture Galleries, which allegedly, and to our best belief, was not selling items. They have no front windows in their establishment. When we went there, there was only one girl there and one man, and it appeared that they would normally have quite a large number of people there. They explained to us that while they invited people to come in and browse they would make no selling, would tolerate no sales and, as a matter of fact, have consistently advertised that they would make no sales on Sunday.

They said, what we are doing is letting them window shop on the inside, the same as they can look through the

windows at furniture on the outside, through the windows on Hamilton Street, we are allowing them to walk through [fol. 200] the store, and we are not offering anything or allowing anything to be offered for sale.

Q. Did you hear Mr. Hubschman's testimony concerning the sales, the purchase that was made by one of his shoppers at the Fullerton Furniture Store; that was the one with the receipt dated on Tuesday?

A. That was apparently made about a year after this program was started, and, as I recall, the slip which was shown here in court was one which was receipted for a Tuesday, and I am not able to state whether there was a sale on a Sunday or not, but I say, by and large—

Judge Hastie: Do I understand that the account to which we have just been listening refers to occurrences in December, 1957?

Mr. Rubin: Yes, Your Honor.

The Witness: Yes, sir.

By Mr. Rubin:

Q. Are you familiar with the stipulation that has been filed of record in this case, and that was made part of the record in the appeal to the Superior Court of several employees of Two Guys From Harrison, that was entered into between you and the attorney for the plaintiff?

A. Yes.

Q. Are you familiar with that part of the stipulation [fol. 201] having to do with a list of certain stores which were said to be open on December 8, 1957, which was submitted to you by the plaintiff?

A. Yes, I received a letter, dated I think the 12th of December, 1957, from Mr. Efron, counsel for the plaintiff, in which he called attention to the fact that professional shoppers had been hired to go through the county on the 8th of December and make purchases in various stores.

These for the most part were what the lower court described as foibles, a comb, or a pack of cigarettes, or some very small and minor item, and I noted also from the letter that Mr. Efron said that the list of these establishments was not given for the purposes of, I think he said, assisting

in the prosecution or the enforcement of the Sunday law, but to call to our attention that others were open.

As a result, my girls in the office, three of them, called the various establishments that had been named and asked whether anyone had appeared there and asked them to close and comply with the Sunday law, and they said no, and as can be indicated from the list most of those were like gasoline stations, grocery stores and so forth. There were no department stores or stores selling any large number of items or anything like that. They were usually a candy shop, a gas station, or a food store, something like that.

[fol. 202] So as a result of receiving the letter we did call and ask whether they had been asked to close and whether they had indeed sold anything which was within prohibited classes, and they seemed to indicate that they had not, and, as a matter of fact, when we received these lists, as can be indicated from those exhibits, the name would be like Esso Station at a certain location, or a grocery store at a certain location, and in my letter to Mr. Efron I told him that certainly you cannot arrest an inanimate object; we would appreciate if his people had the names of the persons who had made these alleged sales, if they would kindly go and swear out an information, our office would be of assistance to them in providing the proper forms, if the alderman needed them, and also in the event of an appeal from a conviction our office would handle and oppose the appeal.

Q. Is this particular list similar to the lists that were subsequently submitted to you for the remainder of that month?

A. Yes, sir.

Q. All of which appear in the stipulation?

A. Yes. There were two or three times when this happened and on at least one other occasion I wrote to Mr. Efron asking their cooperation in the same way.

[fol. 203] Q. Was there ever an instance in which a prosecution was brought by Mr. Efron or his client and then you were asked to assist in any appeal?

A. None was brought nor did we ever receive the name of any individual who had allegedly broken the law.

Q. Would you have taken charge of the prosecution in case an appeal had been taken in any such prosecution?

A. Absolutely, we would feel that was our duty.

Q. What guided you as district attorney in determining the enforcement methods which you would follow with regard to the Sunday law? In other words, this list of stores, you agree, is accurate, that was submitted by Mr. Efron.

A. I would think so.

Q. Why didn't you then spend your time checking those stores instead of, for instance, the plaintiff?

A. Well, it was impossible to be everywhere and, of course, we had hoped and we assumed that the policing agencies were cooperating and were going around. But, as I say, these stores were primarily stores handling, the bulk of their—practically all of their merchandise was things that consisted of items that had already been listed as necessities; and we couldn't very well cover each and every situation.

We asked for the cooperation of all the citizens. As a matter of fact, we had a piece in the paper that if a citizen [fol. 204] saw a violation, as well as these folks who were shopping for the plaintiff, if they saw a violation, they should kindly take the name and the address of the individual allegedly violating it, and do the very same thing that I asked Mr. Efron and his people to do.

Q. What happened then after December 8, the first Sunday that you were describing?

A. Well, I contacted the Attorney General's Office, Mr. McBride, and told him about our problem, which had assumed major proportions, and told him we did not have sufficient personnel to attempt to reach every area of the county, and asked for the help of the Pennsylvania State Police.

Mr. McBride indicated that it was not the policy of the state police to attempt to enforce local policing problems, and suggested that we again ask the various people to comply, and if they did not comply the following week on Sunday, then we were to come to Harrisburg on the following Monday morning.

As it happened, we did feel that we got compliance throughout the county, except for the plaintiff, and we

called the Attorney General, and the Attorney General asked us to come to Harrisburg in any event.

So when we went there he said that if necessary he would cooperate and have the state police cooperate, but I indi- [fol. 205] cated to him that since things had simmered down to the point where there was really only one major party not complying, that I thought with the personnel we had we could get along.

Of course, later on the state police were sent in on another occasion, but that is another matter, that did not happen at that time.

Judge Hastie: How much longer will your direct examination require?

Mr. Rubin: It will be quite a bit longer.

Judge Hastie: Is this a good stopping place?

Mr. Rubin: Yes, sir.

Judge Hastie: Counsel from out of town, is it convenient for you to be here by ten in the morning? I do not know whether you are remaining over or not.

Very well. The court will adjourn until ten o'clock tomorrow morning.

(Adjournment at 4:15 p.m. to 10:00 o'clock a.m., Wednesday, October 14, 1959.)

[fol. 206] **Transcript of Hearing—October 14, 1959**

Philadelphia, Pa.
October 14, 1959.

[fol. 207] DEFENDANT'S EVIDENCE (Continued)

Mr. Kohn: For the convenience of the Court, sir, we have placed triplicate sets of Exhibits P-1 to P-9 on the bench before each of you and those are the exhibits to be checked.

Judge Hastie: You were in the midst of direct examination of a witness.

Mr. Rubin: Yes, sir.

Mr. Kohn: If Your Honor please, I think in view of the fact that Mr. McGinley has taken the stand we can bring out on cross-examination, by a formal reading of the depo-

sitions what we want, so Mr. Rubin will continue with his examination and then we will cross-examine.

[fol. 208] Judge Hastie: All right.

The deposition had to do entirely with Mr. McGinley's testimony, did it?

Mr. Kohn: Yes, sir, the deposition we were referring to was Mr. McGinley's deposition.

Judge Hastie: You may proceed, Mr. Rubin.

PAUL A. McGINLEY, recalled.

Direct examination (Continued).

By Mr. Rubin:

Q. Mr. McGinley, when we were stopped yesterday afternoon you were telling us about a discussion you had with the Attorney General relative to the enforcement problem of the Sunday laws in Lehigh County.

Was anything ever done by the Attorney General with regard to this particular problem?

A. Yes, the Attorney General, when we met with him in Harrisburg, decided to commence a quo warranto proceeding against the plaintiff.

Those proceedings were started in Dauphin County Court in Harrisburg and as far as I know they have not been completed as yet.

Q. In other words, they are still pending?

A. That is my understanding.

[fol. 209] Q. Now, going back for a minute, Mr. McGinley, prior to December, the first week of December, 1957, was there any instance after you became District Attorney and before this problem arose late in 1957, where the Blue Laws, the Sunday laws were called to your attention?

A. I think it was in April of 1957 when I received a phone call from a party who identified himself as being a citizen of Northampton County, from the portion in Bethlehem, Pennsylvania, which is located in Northampton County, who called my attention to the fact that a place in Fountain Hill, which is in Lehigh County, was open on a Sunday, and asked me what was intended to be done about this.

I pulled out the law. I think it is the first time I ever looked at the Blue Law, but not the last. And I took a quick perusal through it and told him that it was apparent that the law was quite broad and that it might be quite difficult to succeed in enforcing the law.

I told him, however, that if there were complaints that they should kindly go to the alderman's office and kindly swear out an information and our office would be glad to be of assistance, if there was a conviction and an appeal from the alderman's office.

We also told him our office would be glad to send the alderman whatever requisite forms were necessary to be [fol. 210] used in the proceedings.

Q. Did anything occur subsequently with regard to this situation at Fountain Hill?

A. No, except that when the problem came up in December of 1957 Fountain Hill—that store was one of those which was open. It was a place with two or three personnel in it and they were arrested on the first day, that is, on December 8, by the Fountain Hill Police, and thereafter they closed and have remained closed, as far as I understand, ever since.

Q. So the best of your knowledge this call in April of 1957 was an isolated instance?

A. It was isolated and it was from someone outside of the County, and although we didn't foreclose the fact that he had a right to go into the County and to bring a proceeding, we felt that if he did that that that would take care of that specific problem.

Q. Going back now to the December 8 situation, which you have now gone over for the Court, will you please tell us what happened after December 8.

A. I wonder if I may correct one thing I said yesterday, which I found to have been in error, when I checked my notes, sir, checked my notes as to the arrests being made. I had said yesterday that we went to Coplay Discount House after going to the plaintiff's establishment, and that, [fol. 211] upon our request, they made calls to New York and had closed.

They closed the second week. What I meant, and what was the fact, was that this first Sunday, on December 8,

they did not close, and we therefore were forced to have arrested the following day all of the personnel—there were fourteen I think in the store; we arrested all of the personnel who were working there that day.

They have incidentally, on a number of occasions since that time, called me, through their attorneys, and told me they intended to open.

Mr. Kohn: That is objected to, sir.

By Mr. Rubin:

Q. This one instance you were discussing was on December 8 itself?

A. Yes, that is right.

Q. What happened after that, December 15 and so forth?

A. Concerning Coplay Discount House?

Q. No, generally.

A. Oh, well, generally, on the Monday after December 8, that was December 9, the various arresting officers went and swore out informations throughout the County in the City of Allentown and Fountain Hill, and Whitehall Township.

As I said I think yesterday all but six in Whitehall [fol. 212] Township agreed to close, but there were personnel from those stores closed. In each case it was I think all of the personnel were arrested, with the exception that Two Guys from Harrison, in which case there were so many we just couldn't get all the names, and I think we arrested or had arrested about seventy or seventy-two cases, and that amounted to about one-fourth or one-fifth of the personnel in the store.

I will say, too, that there are a number and were a number engaged in the food, drug and restaurant departments, which we had instructed our people not to bother with, and in those departments, such as the drug department, they sold film and combs and all that type of thing which very nearly is indicated on the lists that were sent to us, but we did not disturb them, we had such a big job we just couldn't do it.

Q. Are these the departments which Mr. Hubschman on our prior hearing in September admitted were not closed at any time.

A. That is right.

Q. What happened on December 15 and subsequent Sundays?

A. Well, on December 15 we of course kept the policing agencies alerted and they made their rounds in the various areas.

[fol. 213] On the 15th I had no intention of going to the plaintiff's establishment myself, and actually we heard on the radio that there was a great commotion in that area, and I went there to see what was wrong and found that the Mack truck workers had set up a picket line in front of the store, advising people not to purchase commodities on Sunday.

We went into the store and we began, because we were requested to do so by the Attorney General, making token arrests every Sunday of ten persons who were working personnel in the store.

Q. Why did you make arrests, as you say, on a token basis rather than arresting everyone?

A. Well, we knew that these cases would be—this problem was going to be tested, and we did not want other merchants to feel that they were entitled to open up with immunity and continue selling articles on Sunday while the cases were in the courts. So at the request of the Attorney General we made ten each Sunday at the plaintiff's establishment, and they were cooperative; they would come to the door and hand us a list of—hand our detectives a list of ten people, and say: Here are the ten for this week. And then on Monday an information would be sworn out. There was an agreement between Mr. Josephs, representing them, with Mr. Efron, that they would not claim that they were not working on Sunday. So we ac-[fol. 214] cepted that and we continued to make these token arrests.

Q. This is the end of 1957, and the beginning of 1958. Was there at that time a state court proceeding instituted which was being fought through the courts there?

A. Well, of course, the quo warranto proceeding I believe was under way, and then there were these seventy-two initial cases which had been started in the alderman's office on the 9th of December, and it was indicated to us—

that is, against this plaintiff's employees, plus others, but these were the only ones that had taken appeals, and they appealed to the Court of Common Pleas—to the Court of Quarter Sessions of Lehigh County, and that subsequently went through—we agreed that two pilot cases which were picked out would be the controlling cases of all those seventy-two cases, and they went through the lower court, they went through the Superior Court, and the Supreme Court of Pennsylvania refused to review the Superior Court.

The defendants notified us they were going to appeal to the United States Supreme Court, but that appeal has never been perfected, and that is the end of those cases.

Q. After December 8, 1957, were any of the so-called downtown merchants in Allentown, to the best of your knowledge, open; that is, the downtown merchants whom you would consider large stores, department stores, and [fol. 215] so forth?

A. There were none after December 8 nor on December 8. They had threatened to open December 8, but when we had our meeting of the 5th of December, then all of these stores agreed to close.

I think there were thirteen or eighteen had indicated to us, through their lawyers or through the press, that they were going to be open, and it became apparent that many more would be. That is why we held our meeting of December 5 and let them know that they were going to be subject to prosecution if they opened. They did not open and they never opened thereafter. The only places that were open were a few candy stores, or restaurants and things like that.

Q. What about the stores that were referred to as the Seventh Street stores and were mentioned yesterday, such as Bause's Drug Store?

A. Bause's Drug Store roped off those areas which had toys and other foibles, other than the drug counters and the food counter, and they have opened on several occasions since, and on each occasion we have sent people there and they have been arrested, and, as a matter of fact, a conspiracy case was brought against the personnel of Bause's Drug Store.

Q. What has happened to that case?

[fol. 216] A. That is still within the alderman's office as far as I understand, I believe at the request of defense counsel. Conspiracy cases were started against three people in the Two Guys from Harrison personnel; at the request of defense counsel they were heard very quickly. Those cases, incidentally, have now been nol-prossed, because we didn't feel that we wanted to go forward with those.

Q. Do you have any intention at all of making any conspiracy arrests or proceeding with any conspiracy charges?

A. No, we do not.

Q. What about Nestor's?

A. Nestor's was the same as Bause's. That was a sporting goods store. They opened up on several Sundays and the personnel there were arrested on a number of occasions, and a conspiracy charge was brought there too, which has not been disposed of.

Q. How about the Wayside Gallery?

A. Well, they were open on the first day, but after that they were not open.

Q. What about Anchor Supply?

A. Anchor Supply opened the first day, that was the 8th of December, and there were six personnel in there, all of their personnel were arrested, and they have never opened since.

[fol. 217] Q. Now, Mr. McGinley, are you familiar with the fact that various industries in Lehigh County have remained open on Sunday throughout this period?

A. Well, when you say remained open, I do know that the cement mills and Mack Motors operate, but not in the sense of the word that they operate as they do on the weekend. All they have in are personnel to keep fires from going out and so forth.

Q. What industries do you have in Lehigh County?

A. Well, we have cement industries; we have Mack Motors; we have a great number of textile industries, none of which have ever operated on Sunday to my knowledge; we have engineering concerns; we have slate industry. It is quite a commercialized and industrial area. But, as far as I know, the cement mills and the Mack Motors were the

only ones that did not close down within recent years. Of course, during the war years that was another story.

Q. Did you ever make any arrests at Mack Motors or, say, the cement industries?

A. No, we didn't.

Q. Why didn't you?

A. Well, there is a case on the books which states that if it is necessary for the continuation of the industry [fol. 218] on the following day that it is proper to allow that industry to operate on a Sunday because it is a necessity.

Mr. Kohn: Would you give us that citation, Mr. McGinley.

The Witness: I have it here.

Mr. Rubin: I will give it to you.

The Witness: 38 Pittsburgh 213. 38 Pittsburgh 463. Appealed, and affirmed in 146 Pa. 546.

By Mr. Rubin:

Q. Have various amusement enterprises been operating in Lehigh County on Sunday?

A. Well, the only ones that I would know about, there is a park called Dorney Park, which is an amusement park, and several bowling alleys operate on Sunday.

Q. Are the golf courses open?

A. I believe also baseball games are operated on Sunday during the summertime.

Q. Are the golf courses open on Sunday?

A. I would think so. I know they are at the country clubs, and I assume the municipal golf courses are because I think I have seen that in the newspapers. I think there is one.

Q. Do you play golf?

A. No. I used to. I used to play a lot of golf.

Q. But you would agree for our purposes that these golf [fol. 219] courses have been open on Sunday?

A. I am sure they have.

Q. Why did you not make any arrests at these places?

A. Well, for several reasons. First of all, we had to use our personnel in the areas which appeared to us to be

most important at the time, and, secondly, it was recreational, and we felt that rest and recreation were rather synonymous, and that it was necessary for rehabilitation to have people allowed rest and recreation.

Q. Was your personnel sufficient to have allowed you to make arrests everywhere where you knew there might be possible violations?

A. No, we did the best we could with the personnel we had.

Q. Now, Mr. McGinley, do you know Mr. Max Hess?

A. Yes.

Q. Who is Mr. Hess?

A. He is a merchant who runs Hess Brothers. Hess Brothers I believe is a corporation. I think he is the president of the corporation known as Hess Brothers in the City of Allentown.

Q. What is Hess Brothers, this corporation?

A. Hess Brothers is the largest retailing local store we have in the City. It is on the main street of the City.

Q. Would you call it a department store?

[fol. 220] A. Yes, it is a department store in the same line, but only probably smaller, as a store like Wanamakers.

Q. Have you ever represented Mr. Hess personally or the department store in your capacity as a private attorney?

A. Several times.

Q. Would you give us some examples?

A. About four years before I was in the District Attorney's office I did some work as a private prosecutor in shoplifting cases.

There was a campaign on by the store to try to stop shoplifting, and I did some work for them as a private prosecutor. Most of them—I think all of them were guilty pleas before the Courts.

Q. Do you recall what fee you might have received for those cases?

A. I think I handled maybe a half a dozen cases of that type. I believe there was $50 for each appearance in court.

Q. Did you represent Mr. Hess or his store in other proceedings, if you recall?

A. On two occasions there were assessments against his mother's home and against his own home, with which he was not satisfied, and I didn't appeal them, I went to the assessing municipalities, and by agreement they had lowered the assessments in a small degree.

[fol. 221] Q. When did these cases arise?

A. I think that was about 1956 or 1957.

Q. And do you recall what fee, if any, you received for that work?

A. That was around—there wasn't too much involved, I think it was around $135 or $125, something like that.

Q. Did you ever represent the store itself in any proceedings?

A. In one proceeding the store had been notified by the School District that it was not allowed to hire anyone under eighteen years of age to clerk in the store, for the reason that they had what was called the Patio, which Patio had a liquor license, that is, a restaurant, and they said, since the Patio was located within the store, anyone under eighteen could not work throughout the store under the liquor laws.

So I went to Harrisburg, discussed it with the Attorney General's office and it was finally reconciled to the fact that personnel under eighteen—or under twenty-one I think was the arrangement—could not work in the Patio, but could work in the other departments in the store, since they were not concerned with dispensing or handling liquor.

Q. Did you receive a fee for this particular representation?

A. I did.

Q. Do you recall what it was?

A. I think it was six or seven hundred dollars.

[fol. 222] Q. Would you call yourself Mr. Hess' or Hess Brothers' attorney?

A. I never represented them, they have a number of counsel, they have general counsel, they have counsel who do a lot of their work. My work for them has been very sporadic.

Q. Do you know who is generally considered their counsel?

A. The firm of Mr. Aaron Boyle is general counsel, and the firm of Walker and Walker does a great deal of their work. Mr. Francis Hare does apparently a lot of their collection work. And there are others; they have people in Philadelphia and New York and other places.

Q. Now, Mr. McGinley, in the course of your political activities have you ever solicited and or received any contributions from Mr. Hess or from Hess' department store?

A. Yes, before running for district attorney—while running for district attorney, in keeping with solicitation in an endeavor to gain funds for campaigns, one of the many who was asked to contribute was Mr. Hess, and in that proceeding he did contribute, I think it was two hundred to two hundred fifty dollars. I think it was given to a designee, who bought advertising or did something with it. I don't remember all of the details.

Q. What campaign was this?

A. That was in 1955.

[fol. 223] Q. When you were running for district attorney?

A. That is right.

Q. Have you run for any other political office in Lehigh County?

A. I ran for State Senate last year and was defeated, and I called Mr. Hess, among others, for a contribution. Mr. Hess refused to give any contribution stating that he was not contributing to any political party during that campaign.

Q. Aside from possible campaign contributions, which you have mentioned, and legal fees, have you ever had any private dealings with Mr. Hess?

A. The only private dealing I had in part with him was a dealing in which the baseball field located on the Seventh Street Pike in the City of Allentown, known as Braeden Field was sold to Mr. Hess by a syndicate of which I was a member.

Q. When did you or your syndicate acquire this particular property?

A. The Saint Louis Cardinals owned Braeden Field, they had a farm club in Allentown, and in 1957 they notified the public, through the public press, that they were going to

leave Allentown and put up this field for sale. We felt, others and myself, that it had valuable frontage which was fit for commercial use, and we felt that we would like to see baseball preserved in the City. So three of us agreed [fol. 224] to buy Braeden Field from the Saint Louis Cardinals.

Q. Who were the other two persons?

A. Pardon me, this was in the summer of 1957.

Q. Who were your two associates?

A. The other two were Mr. James Freedman of the City of Allentown, who subsequently pulled out and did not take title, due to the fact that he took the attitude that in the Sunday sales program I had ruined the value of the frontage as commercial real estate, but his brother in New York, and attorney, A. E. Robert Freedman, had taken up his part of the contract, which was 20 per cent, and he became an owner of 20 per cent. A businessman in the City of Allentown, by the name of Philip N. Sorentino became the owner of 40 per cent, and I became the third owner, of 40 per cent.

Q. Was this particular property improved at the time you bought it?

A. There was no improvement on the frontage, but there was a very fine baseball field and stands, which we were aware had cost the Saint Louis Cardinals $450,000 to put there.

Q. Do you still own all of this property?

A. No.

Q. What do you own of that property, if any?

A. After acquiring it we put up a building on the front- [fol. 225] age for Nationwide Insurance Company, which we still own, and I think that is about 80 or 90 feet frontage on the highway.

Q. Are you leasing this to Nationwide?

A. Yes, it is on a long-term lease.

Q. I gather that you do not own anything beyond this frontage any more.

A. The balance was sold to Mr. Hess.

Q. Would you please give us the details of that transaction?

A. In November of 1958, which was about a year after these proceedings had started on the Blue Laws, I had a call from Mr. Hess indicating a desire to discuss sale—purchase by him of this baseball field. I told him it was for sale.

We had had one summer of baseball in which we lost a considerable amount of money and we felt that we had done all we could to preserve baseball in the City of Allentown; if someone else wanted to preserve it it was up to them.

So we had been negotiating with Central Catholic High School—these, of course, were matters unknown to the public—in which Central Catholic offered to buy the field from us and to allow us to retain the commercial part of the front. They wanted, however, to take back a sizable mortgage, and we were not quite willing to do that, although I suppose we would have done it if Mr. Hess had not come [fol. 226] along and offered to buy.

Q. How did Mr. Hess approach your on the proposition?

A. I had a telephone call in which he asked if it was for sale, and I said we were already negotiating for the sale.

Q. When was this call?

A. November of 1958.

Q. What happened at that time?

A. Well, I had a meeting with my other principals, and we agreed to sell it to him, and finally there was a sales contract entered into and final settlement was held late December of 1958.

Q. Approximately a month after the first phone call?

A. A month and a half.

Q. In that interim period did you talk to Mr. Hess or meet with him at any time?

A. I met with him, with his lawyers and store manager, at his home on one occasion, and I think there was another occasion. I will think of it. It slips my memory now. I think there was another occasion.

Q. Was anything discussed at this meeting, or these meetings, as the case may be, other than the prospective sale of this property?

A. Now, the reason we met was because of the baseball field, nothing else.

[fol. 227] Q. Was Mr. Hess interested only in acquiring a property owned by you or was there any other property involved?

A. He told me when he first called me—and incidentally, he called me another time later at 3 o'clock in the morning; but he called me and said that he was interested in acquiring the baseball field only if he could acquire the acreage behind the baseball field, which was about thirty-five acres.

I told him that we had—I had already discussed acquisition of that land by our syndicate with the lawyer who represented the estate in which the property was held, and I told him that I felt perhaps we could get that for him.

He said he would be interested only if he could get both pieces.

Q. Do you happen to know personally why he wanted both pieces?

A. Well, after he bought the land he put an advertisement in the newspaper that he was going to put a commercial establishment, I think it was a store, out there.

Q. Did he actually acquire both pieces in connection with your sale?

A. Yes, and besides that he acquired an additional fifty acres which was contignous to the other piece that was purchased from us.

[fol. 228] Q. Did you take any part in the transaction by which he acquired the property held by the estate?

A. Only in the thirty-five acres which was behind the baseball field.

The estate took the attitude that since they had discussed it with me that I would have to be gotten out of the picture so there wouldn't be any problem of legal problems, so I signed an agreement with the estate for $3,600 an acre and immediately thereafter signed an agreement with Mr. Hess for $3,600 an acre.

Q. Did you represent the estate itself as counsel?

A. No, Mr. Rappoport, Attorney Rappoport, represented the estate.

Q. When you say you signed an agreement, you mean you took title to a purchase?

A. We didn't take title, we signed an agreement of sale. We never took a deed, we took equitable title—I did, in my own name.

Q. In the course of either that transaction or of the transaction in which you sold the property owned by you and your associates did you receive any legal fees?

A. No. The only thing I received was this. When I spoke to the estate I asked them if they were willing to pay a commission for the sale of this real estate, and the lawyer [fol. 229] said no.

I told them then that they would have to pay the transfer tax, which amounted to around $2,600, and I told him that if possible I would ask the buyer for him to pay it, and asked the estate if they would expect this money back; they said no, if you can do that, that will be fine.

Actually, at final settlement I got that check, they gave it to me, made it in my name, I retained that $2,600, and when Hess went to put his papers on record through his attorneys I assume they had to pay the transfer tax.

But there was quite a bit of running around and red tape involved and we felt—I felt and the estate felt justified in my retaining that money.

Q. How much profit did you and your associates make in the sale of the Braeden Field property to Mr. Hess?

A. Well, we had lost, including depreciation, $13,000 in the operation in the year we owned it.

We had paid $180,000 for the baseball field and land. We sold it to Mr. Hess for $200,000, and we retained the title to the building and the land, which I consider—the building cost us $22,000 to put up, the land the accountant figured $3,000. So we retained that, say, $25,000. I assume it is worth more than that, but that is the way it is carried [fol. 230] on the books, at any rate.

Q. Mr. McGinley, are newspapers published in Allentown or Lehigh County on Sunday?

A. Yes.

Q. To the best of your recollection have they always been published on Sunday?

A. That is right, the same as in Philadelphia.

Q. Have you ever made any arrests in connection with the Sunday laws against newspapers?

A. No, we haven't, nor against the radio stations.

We take it that communications are vital to our national defense, and we didn't want to get into an area where we

would know that the Courts wouldn't sustain anything we did, and we assumed, and I think rightfully so, that they would not sustain us on those cases.

Q. At any time during the course of this Sunday law problem that you had did you ever discuss with Mr. Hess or did he ever discuss with you the problem of the Sunday laws?

A. Not personally. On the afternoon of the 5th of December, the day that we had the meeting, I had a call from his lawyers telling me that they were in meeting and they had not decided as yet whether they were going to close or not.

And I said: Well, it is pretty simple what will happen if you open?

[fol. 231] Finally, there was an announcement in the newspapers that they were closing, and then there were announcements from many other areas in the County that they were closing—were not going to be open, that is. They had threatened to open and they never did open.

Q. Subsequent to this period, during the year 1958, was there ever any indication from Mr. Hess that he may open?

A. Not to my recollection.

He called me in March of 1959, when the Circuit Court had handed down its opinion, in which Judge Grim's findings were overruled in that lack of jurisdiction, and he called me personally at the office and asked me if this was now the end of the Blue Laws.

Judge Welsh: He told you what?

The Witness: The end of the Blue Laws problem.

I said no, that the Circuit Court had simply indicated that the case should be returned for the appointment of a 3-man court.

He said, oh, he indicated that if it was the end he was going to open in Whitehall Township when he finished the store.

But I told him if he opened he would have the same problem as the others.

By Mr. Rubin:

[fol. 232] Q. Now, since the Court of Appeals vacated Judge Grim's findings and in effect reinstated the restrain-

ing order that had been issued in this case have you made any arrests in Lehigh County?

A. No.

Q. (Continuing) Under the Blue Laws?

A. No.

Q. Why not?

A. All this litigation was pending, we could see that the constitutionality was the point in issue; and we felt we wanted to obey the preliminary injunction which Judge Welsh had signed. We took it—maybe not rightfully so—that it was reinstated, although the Court did not indicate that in its opinion, but we took it that way, and we did not want to continue to make arrests where this matter was still before the Court.

Q. You agree, don't you, that the restraining order as such did not prevent you from arresting anyone except the present plaintiff?

A. That is correct.

Q. But you nevertheless refrained from making any such arrests?

A. We refrained because there was such general compliance, in the first place, it wasn't necessary to make ar- [fol. 233] rests; in the second place, even if there had not been general compliance I would have hesitated because of this situation—I knew that they would go right in and ask for a restraining order, if we arrested other people, if they had been open. They didn't open though; some of them threatened to open, but they didn't.

Mr. Rubin: Cross-examine.

Judge Welsh: May I ask a question, if you do not mind?

Mr. Kohn: Go ahead, sir.

Judge Welsh: Mr. McGinley, you said yesterday that you did not know of any violations of the Sunday law prior to this explosion up there. Had it been the custom for the District Attorney's office to prosecute violations of the Sunday law? I do not mean just in your term, but as a general thing.

The Witness: I know of none over many years.

As a matter of fact, when we made the stipulation, Mr. Josephs and I were going to say, for many years there were no violations, but one of the judges said he was district

attorney six or eight years before, and he said that he had one case that he knew of, I think which he handled as district attorney, which had to do with Sunday movies out in a township where a referendum had not been held, and he [fol. 234] said: You had better limit it to six years, because you are not being completely accurate.

Judge Welsh: I asked that question to find out if you had any notification officially of violations of the Sunday law, because in Philadelphia, unless it has changed very recently, our District Attorney did not handle that question at all; it was handled by a justice of the peace or a magistrate and the police, and we had various times when the police would be busy, but generally the District Attorney never touched it.

I wondered if you would know officially of violations of the Sunday law, except as you would know of it personally, being an active citizen of your community.

The Witness: I never received any knowledge officially, with the exception of the one case in March or April of 1957, which I have indicated, from an out-of-county call, and, as Your Honors are probably aware, we have come from perhaps a sleepy little community which doesn't have these problems, and this thing blew up into a tremendous mushroom all overnight practically.

Judge Welsh: I can understand.

Thank you.

All right, Mr. Kohn.

Mr. Kohn: Thank you, Judge Welsh.

[fol. 235] Cross-examination.

By Mr. Kohn:

Q. Mr. McGinley, I think you have changed your testimony today in two respects from what it was yesterday.

First about Coplay Discount.

Second, you testified yesterday that prior to this week in December, when you began to make these arrests at the plaintiff's place, you had never received any complaint from anybody about any violation of the Blue Laws. Today you testified that you had received one in 1957 about this place at Fountain Hill.

Is that correct, in those two respects you have changed your testimony.

A. I tried to explain that I was in error—

Mr. Kohn: If Your Honors please.

Judge Hastie: Answer yes or no.

Mr. Kohn: Answer the question yes or no.

The Witness: To the first one Coplay Discount House, yes.

To the second one I can't state.

By Mr. Kohn:

Q. Well, let me read you what you said yesterday. This was in response to a remark that Judge Hastie had made when I made an objection to a question. You were [fol. 236] supposed to confine your testimony, you will recall, to the problem of law enforcement and what developed, and you said this—

Judge Hastie: From what page of the transcript are you reading?

Mr. Kohn: This is yesterday's transcript.

Judge Hastie: At what page?

Mr. Kohn: Oh, it is at page 5.

By Mr. Kohn:

Q. (Continuing) "We had no problem prior to the opening of the plaintiff's store. There was in the entire time, almost a year in my office as district attorney I had not heard a single complaint about any retailing on a Sunday, and my personal observation was that there was very little, if any, retailing, as I say, with the exception of a few gas stations and grocery stores and so forth."

Now, today you have testified that there was this other complaint, prior to plaintiff's opening, at Fountain Hill.

A. In that respect my testimony yesterday was incorrect. However, I—

Q. You have answered the question.

Now, do you wish to change any other part of your [fol. 237] testimony?

Judge Hastie: Just a moment.

If you wish to explain you may explain. However what?

The Witness: However, I felt that the case had to do with the main streets—the question had to do with the main streets in the City of Allentown and the operation of the County generally. This complaint had come from a citizen other than in the County, and I think I have explained today what the—

By Mr. Kohn:

Q. But it dealt with an operation being conducted within the County?

A. That is right.

Q. Do you want to change anything else in your testimony yesterday?

A. As time goes on I may want to. If I have been in error I certainly want to have the Court know what the truth is.

Q. All right. Well, now let us discuss the December 5 meeting that you refer to. That was supposed to be a public meeting for public officials, was it not?

A. Not necessarily. We didn't limit it to that. We invited public officials, but there were others there. The attorney for the plaintiff was there.

[fol. 238] Let us see. At page 7 of your deposition, do you recall that you testified as follows—the deposition which was taken of you in this proceeding on July 27, you testified as follows at page 8:

> "I called the reporters and told them that we were going to have this meeting, and we would appreciate it if notice was given through the public press to everyone who was in the law-enforcing field, to be present in my office on the date."

A. Yes.

Q. Now, as a matter of fact, there was nobody there, was there, from plaintiff?

A. I believe Mr. Josephs was there.

Q. Are you sure of that?

A. I may be wrong. I am only—there were a lot of lawyers there.

Q. Well, was Mr. Josephs or any other lawyer representing the plaintiff there?

A. It is my impression that he was. If he was not then I may be wrong. As I say, Mr. Walker was there representing Mr. Hess.

Q. Ah. Representing Hess?

A. I think so. And there were other lawyers there, quite [fol. 239] a few lawyers. I thought Mr. Josephs was there.

Mr. Kohn: Would you please mark this?

(An affidavit was marked Plaintiff's Exhibit 25 for identification.)

By Mr. Kohn:

Q. You are now sure though that Mr. Hess' lawyer was there?

A. I am positive he was. I think he was.

Mr. Kohn: We had, sir, some exhibits marked prior to this examination, so that we could put them in without interrupting the proceedings.

Judge Hastie: Yes.

Mr. Kohn: So that this number, P-25, is out of order, but all the other numbers in between are occupied by exhibits which I will cover.

Judge Hastie: Yes.

By Mr. Kohn:

Q. I show you Exhibit P-25, which was a statement or affidavit which you gave us the other day, prepared by one of your secretaries, in which she says that for the meeting, when she was told on Tuesday, December 3, to call the following people for this meeting at your office: The Bethlehem Chief; chief of police in all municipalities having police forces; the State Police; the Emmaus Police; representatives of their force or the chiefs themselves; at a meeting to [fol. 240] be held Thursday morning; that would be the 5th—George Kissler, representative of the Mayor; the

City Solicitors and County Solicitors as follows, Mr. Vaughn, Mr. Gardiner, Mr. Ritter, Mr. Sacks, Mr. Weaver, Mr. Stein, Mr. Brennen; and then, finally, Chief Reilly; and Stranzl, your County detective.

A. Right.

Q. Those were the people she was requested to call?

A. I told her to call everybody. Those are the ones that she said that she did call.

Q. Oh, then you told her to call other people whom this girl, in her sworn affidavit, did not include?

A. I didn't say that. Here is a girl working in the District Attorney's office thirty years, and I told her to call all the law enforcement people she could get in touch with and make notice through the public press we are going to have this meeting.

Q. All the law enforcement people she said.

A. And solicitors. There are a number of township and town solicitors there.

Q. Every one of them a public official?

A. I would say most of those. I think all those on there are.

Q. You as a young boy, at the age of eight or nine, I think you said, had impressed upon you the two decisions—

[fol. 241] A. I knew of them.

Q. Let me finish, please—in the Sunday Blue Law case dealing with baseball and the Sesquicentennial in Philadelphia. Right?

A. I knew of the cases. I mean I heard it discussed at that time.

Q. So that when you came to office you knew that amusements were one thing that definitely were prohibited and were illegal on Sunday?

A. I did not come to my official capacity, nor did I think of it. There was no reason to think of it.

Q. Well, you knew that golf courses were open, didn't you, in Lehigh County?

A. Yes.

Q. And you did nothing to close them or to arrest anybody for participating in them?

A. No.

Q. And, as a matter of fact, the Blue Law itself makes no exception, does it, for amusements or diversions? By that I mean, unlike the stipulation with regard to other worldly employment, which exempts necessities and charities, the prohibition against sports and diversions is absolute, without exception, in the law itself, is it not?

A. I am not sure. I mean I think that is for the Court to [fol. 242] determine, not me.

Q. I ask you to read the Act and point to any exception for necessity, charity or anything else—

Judge Hastie: Mr. Kohn, isn't the Court competent to determine what the Act covers and what it does not?

Mr. Kohn: Yes, sir, but I think, sir, we have a right to test this man's good faith and discriminatory activity, since he, in his direct examination, offered certain explanations as to why he had not proceeded against certain other activities.

He has put this all in in direct and I think we have a right to test whether actually the reasons which he assigns are the reasons or whether he was consciously restraining from enforcing this law against anybody, until our store opened.

Judge Hastie: Questions directed at that I think certainly are appropriate.

Mr. Kohn: And that is all I propose.

Judge Hastie: But the matter of asking him to read the statute and what the statute covers, it seems to me serves no useful purpose.

By Mr. Kohn:

Q. Well, you knew at least of no exception provided by [fol. 243] law for any sport or amusement, such as golf? I am not talking now about those which were covered by specific statutory exemptions, like motion pictures.

A. As I said a while ago, I never read the Act until the man called me from Bethlehem, and so I was unaware of what the Act contained.

Q. Well, he called you from Bethlehem in 1957, didn't he?

A. Right.

Q. What time, was it early in '57?

A. I think it was in April.

Q. So that he called it to your attention and you read it in April of 1957, didn't you?

A. I read the part which I thought covered merchandising.

Q. And that is where you stopped reading the Act?

A. I meant I didn't stop, I glanced through it, but I didn't study the Act.

Q. As a matter of fact, you did tell the gentleman who called you—I quote from your deposition in this case, the one we referred to before, of July 27, Page 20:

"Q. Didn't you tell him that if you began to enforce the Sunday Blue Laws, you would have to stop practically all human activity on Sunday?"

And you answered:

"A. I told him, as I read from this book, I said, 'As you [fol. 244] can see, this is a very broad Act.' And I said that this Act went back to the horse and buggy days. I said, 'As you can see, if this Act is enforced to the letter, practically everything will be shut down on a Sunday; all activity.'

"Q. And you thought that would be pretty impractical?

"A. I didn't see, at the moment, why I should, because of this one out-of-county complaint, have our office come into the thing at that time."

A. I told him to go to the alderman.

Q. Actually, prior to this week in December of 1957, you didn't enforce the Blue laws against anybody for anything during any part of your administration, which began in January of 1956?

A. We had no problem.

Q. Well, there were about a hundred stores open in Whitehall Township, weren't there?

A. No, there were not.

Q. Well, you so testified yesterday.

A. I said there were a hundred open on the 8th of December.

Q. And these stores which were open on the 8th of December had not previously been open?

A. They opened after the plaintiff began to operate in [fol. 245] the Township and, as I said yesterday, apparently in self-defense they opened because they couldn't stand the economic pressure otherwise.

Q. But the plaintiff began operating in October of 1957?

A. That is right.

Q. Almost six weeks before December 8, didn't he?

A. That is right.

Q. And you did nothing to arrest, either the plaintiff, as a matter of fact, or anybody else, prior to that first week in December, for operating on Sunday.

A. I did nothing because it was not called to my official attention that these establishments were open on Sunday. It was only after we got all of the focus upon this problem that the case became a matter of official attention to this office.

Q. Now, the focus began on December 3, did it not, and I show you Exhibit P-14, which was a release by Mr. Hess to the newspapers, in which he said, the headline reads: "Hess' to Open 3 Sundays to Seek Sabbath Sale Ban.

"Hess Brothers Department Store today announced a Sunday shopping program which, according to the store's president, is a deliberate attempt to 'rouse public feeling and bring about some official action to halt the mushrooming growth of retail selling operations on Sunday.'

[fol. 246] "The program calls for the department store to be opened for the next three Sundays—December 7, 14, 21—from 1 to 5:30 p. m.

"Max Hess, Jr., president of the firm, added that he hoped by the end of this time that public reaction would make it possible to halt Sunday store openings in the Lehigh Valley."

And the article continues, right?

That was the first public—

A. I think you are in error on the date.

Q. December 2, 1957.

A. You said December 3. This was December 2.

Q. This was the opening gun, wasn't it?

A. I am sure I must have seen that article.

Q. And you saw nothing by way of public protest or complaint prior to that article, did you?

A. No, not that I recall.

(Clipping from Page 19 of Evening Chronicle, December 2, 1957, was marked Plaintiff's Exhibit 14 for identification.)

By Mr. Kohn:

Q. Then on December 3, the next day, Hess' ran an ad, P-15, which said:

"Hess' will be open Sundays 1 p. m. to 5:30 p. m. from [fol. 247] now until Christmas . . . for your added shopping convenience."

Right?

A. What date was it?

Q. December 3.

Mr. Rubin: Excuse me. When you are asking him "Right," what do you mean by that?

Mr. Kohn: Is that correct?

By Mr. Kohn:

Q. Am I correctly stating that this ad so states?

A. Well, the ad speaks for itself.

Q. Well, just so the record will show it; the answer is yes, isn't it?

A. Yes.

(Clipping from Page 10 of the Morning Call, December 3, 1957, was marked Plaintiff's Exhibit 15 for identification.)

By Mr. Kohn:

Q. Then on December 3:

"City Hall 'march' today to protest Sunday sales.

"Hess plans 3 Sabbath openings.

"Department store seeks to 'rouse public feeling'";

[fol. 248] And it refers to the fact that Mr. Hess had previously announced that there would be these openings in his store.

That is the next salvo to this campaign, P-16, is it not?

A. Yes.

(Clipping from Page 5 of the Morning Call, December 3, was marked Plaintiff's Exhibit 16 for identification.)

By Mr. Kohn:

Q. In the evening of December 3 we see that a meeting of the clergy took place on the day of December 3, did it not?

A. Before City Council.

Q. Yes, so that as of the time you called your meeting, the notices for which went out on December 3, nobody had made any protest to you, they marched on City Council, didn't they?

A. No protest to me, with the exception of the hundreds of phone calls I received.

Q. When?

A. Through that entire week.

Q. Do you remember when they were received? Do you have any record of them at all?

A. After these articles appeared in the paper and after it became apparent that Hess Brothers was going to open [fol. 249] its department store on Sunday, we received a great many protests.

Q. But nobody formally protested to you, as they did to City Council?

A. Yes, there were people who came to my office.

Q. Do you have any letters, or any newspaper comment, or anything, other than the fact that you say so, which would substantiate that.

A. I don't make a habit of handing to the newspapers everything that comes through my office.

All I can tell you is that we had many phone calls, hundreds of them. This thing became a real tremendous issue in our community and I had phone calls, as I say, hundreds of them. I had people come to the office, I had labor groups.

Q. All after December 2.

A. Yes, there wasn't a thing before these things appeared in the newspaper.

Q. And you have no written record of any of those calls?

A. We don't keep records—we only have four girls in our office. We have hundreds of calls. We don't keep a log on our calls.

Q. Then you had your meeting of December 5, the one we discussed just a few minutes ago?

[fol. 250] A. That is right.

Q. In which it was announced that you were going to enforce the Blue Laws, is that right?

A. I felt public pressure was such that we had to do something or leave town—

Q. By the way, that was the same week that you—

A. —the District Attorney's Office.

Q. (Continuing) That was the same week that you bought Braeden Field, wasn't it?

A. We had bought Braeden Field in August of 1957.

Q. When did you take title to it?

A. Well, we hadn't taken title. When we agreed to buy that there was no Blue Law problem in the atmosphere. We took title in December, I think it was the third week in December of 1957.

Q. Now, on December 6, the day after your meeting, there appeared an editorial in your local paper, which said, in the morning: Well Done, Max and Paul. Max is Max Hess and Paul is Paul McGinley, is that right?

A. I assume.

Q. And it says: In a series of rapidly moving scenes, the local drama developed by the threat of widespread local retail selling on Sundays reached rather sudden but satisfactory climax yesterday. Any subsequent happenings in [fol. 251] this matter promise to be anti-climactic in their effects upon the people of this community.

A crisis in the entire highly complicated and long-historied question of Sunday business activities was created by Max Hess of Hess Brothers, when he announced on Monday that his store would be open upon the afternoon of the next three Sundays. Now that crisis has largely been resolved by Mr. Hess' announcement early yesterday afternoon that his store will not be opened.

Mr. Hess announced that he was taking such a radical step in Allentown's business history to "rouse public feel-

ing and bring about some official action to halt retail selling operations on Sundays." So it happened that "public feeling" became aroused and "official action to halt retail selling operations on Sundays" has happened. It all has happened even more speedily than anyone, including Mr. Hess, reasonably could have expected or hoped it would occur.

Then, skipping a paragraph:

The District Attorney, Mr. Paul McGinley, supplied the "official action to halt retail selling operations on Sundays."

And that evening—

[fol. 252] A. Do you have a question?

Q. That appeared in the Morning Call.

A. That appeared. It is an editorial opinion, as I understand it.

Q. Then, on the evening, in the Evening Chronicle of December 6, there was this announcement, this being Exhibit P-20, the previous editorial being P-19:

Hess Brothers will be closed on Sundays (and we couldn't be happier about it!) Our hats are off to District Attorney Paul McGinley for his dynamic action against Sunday selling.

And here it says:

We asked for widespread violations! We asked for public indignation! We asked for action! And we got it!

Right!

A. It is a paid ad.

Q. By Hess.

A. He gets a lot of mileage for anything he does.

Q. He certainly does. I agree with you 100 per cent, Mr. McGinley.

A. Yes.

(Clipping from Page 18 of Morning Call, December 6, was marked Plaintiff's Exhibit 19 for identification.)

[fol. 253] (Clipping from Page 23 of Evening Chronicle, December 6, 1957, was marked Plaintiff's Exhibit 20 for identification.)

Mr. Kohn: Would you mark this with the next number.

(A news picture was marked Plaintiff's Exhibit 26 for identification.)

By Mr. Kohn:

Q. I show you, sir, P-26, which is a picture which appeared in the newspaper, of the tract involved in this sale, the entire tract, after you had sold it to Mr. Hess.

Right?

A. Yes, but we only sold a part of it.

Q. I understand that.

At the lower righthand corner immediately outside the broken line which bounds the part Mr. Hess bought is a part marked Allentown Portland Cement. That is sort of roughly a triangular shape.

A. That is right.

Q. Now, you know, don't you, that that part has for many years been owned by Mr. Hess' father-in-law, Mr. Douglas?

A. No, I don't.

Q. You still don't know that?

A. No.

[fol. 254] Q. You didn't read Mr. Hess' deposition?

A. No, I didn't read it.

Q. You didn't know, I suppose, that Mr. Hess for many years has been looking at that entire tract from the standpoint of buying it for the purpose of establishing a shopping area out there on the Seventh Street Pike?

A. No, I wasn't aware of that. We had sent—we had not sent—a realtor had gone to see Mr. Hess some months before he called me and suggested that perhaps he would like to buy Braeden Field if it was for sale. He was told that they weren't interested and that is the last I heard about that.

Then we had the place for sale, we had been called by Central Catholic, we had allowed them to use it as a football stadium, they were interested in buying it. He apparently heard about that and called.

Q. Well now, then there was this talk with the real estate broker a good deal before the time that Mr. Hess called you in November, which you previously testified was the first contact between Hess and you on this property.

A. This realtor, who is on the second floor of my building where my private office is, of his own volition, and without any request from us, apparently saw Mr. Hess. He re-

ported back later that he had been up to see Mr. Hess about selling it and he was not interested.

[fol. 255] Q. So that your testimony is that in a period of just a few weeks Mr. Hess, without any prior knowledge on your part, decided to purchase a very large tract; how many acres is it?

A. Well, there are fourteen, and thirty-five, and fifty; about a hundred acres.

Q. About a hundred acres, of which your fourteen acres just happened to be a part?

A. Well, I don't know whether he was considering purchasing this or not.

Q. And the price was agreed upon between you, $200,000, just in a phone call?

A. No, it was not.

Q. When was it agreed?

A. It wasn't agreed upon until I spoke to his lawyer at a later time.

Q. Where?

A. I think I went out to the home of Mr.—oh, this is what happened: He called me the first time and I think it was when he called me later at three o'clock in the morning to find out what we wanted, and I said I would talk to my people, and they wanted considerably more, but due to our bad experience they were willing to sell for $200,000 if we kept the building we had erected; also we had a contract [fol. 256] with Esso Oil Company, which the option had not been taken up on, and we told him we wanted the oil station there—I told him we wanted the oil station there too.

Q. So this $200,000 deal involving a relatively complex problem of excluding certain property that had very desirable Seventh Street frontage was agreed upon in two telephone calls, one at 3 a. m., between you and Mr. Hess.

A. That is the way he does things. That is exactly how it happened.

Q. Now, you never met in his office and he never met in your office to do any of these negotiations?

A. No, sir?

Q. It was either on the telephone, or at somebody's house, at night?

A. The only time I met with him personally was on two occasions. At his home one night when all of his lawyers were there, and on another occasion when I was called to come to the home of the attorney representing the estate which owned this thirty-five acres.

Q. By poetic coincidence your agreement of sale with Hess was actually signed on a Sunday night, wasn't it?

A. No, the agreement I think with the Newhards was signed on a Sunday.

Q. On a Sunday night?

[fol. 257] A. That is right. Mr. Rappoport was leaving for Mexico the very next morning.

Q. You had two partners in the Braeden tract, did you not? Right?

A. Yes.

Q. But those two partners didn't share in any of the $2,600 that you got by this double payment of the transfer tax, did they?

A. They didn't share, they had done exactly nothing in that regard to getting that piece of property, and actually it was never discussed with them.

Judge Hastie: I want to be sure I understand. Does that concern the property owned by your syndicate or the adjacent thirty-five acres?

The Witness: No, the adjacent piece of property.

By Mr. Kohn:

Q. Which was sold at the same time?

A. Yes.

Q. In other words, he wouldn't buy one without the other?

A. Yes, that is the one that he said he wouldn't buy the field without the other.

Q. It is the custom in your community, is it not, for the seller to pay a transfer tax?

A. No.

[fol. 258] Q. Who pays it?

A. That is a matter of contract.

Q. What is the ordinary custom in the absence of a contractual relationship?

A. I think the—the price is always adjusted. I believe I think usually it is divided, and frequently the buyer pays it, and frequently the seller pays it.

Q. What is the general custom in the absence of an agreement to the contrary?

A. It is impossible to tell you what the general custom is. When I am representing the buyer I like to have the seller pay it. When I am representing the seller I like to have the buyer pay it. If there is any argument we try to get it divided. It is one per cent.

Q. In this case both paid and you kept one tax for yourself?

A. With the knowledge of the estate. They refused to pay me a real estate commission, but that helped in—

Q. Did you inform your two partners in the Braeden Field tract that you had gotten this $2,600?

A. Absolutely not.

Q. Absolutely not?

A. No, they knew nothing about that. They had done no work on it.

Q. You testified in your deposition, didn't you, at Pages [fol. 259] 171 and 172, that it was the agreement with Hess that was signed on Sunday night? Didn't you?

A. I think they were both signed that night. I think I came there with an agreement ready.

Q. Now, despite that coincidence, that the agreement was signed on Sunday night, and despite the fact that in that first week in December, 1958, we were right in the middle of the preliminary injunction proceedings instituted in this Court, your testimony is that nobody, even in joking, made any mention whatsoever of the Blue Laws during this entire time you were at this meeting?

A. The Blue Laws problem had started a year before this, and there was never any conversation between anyone concerning the Blue Laws on those occasions. The only time I had ever a conversation about the Blue Laws with Mr. Hess was this last March, when the Circuit Court handed down its opinion, when he called me at my office.

Q. Wasn't there written into these agreements after the agreements were originally typed the requirement that the two properties had to be sold together?

A. That was written in the night at Mr. Hess' home, when their lawyers took exception to the agreements which I had prepared. They were written in that night, before signature, however, by me.

[fol. 260] Mr. Kohn: Would you please mark this.

(Copy of "Agreement for the Sale of Real Estate," dated December 12, 1958, was marked Plaintiff's Exhibit 27 for identification.)

By Mr. Kohn:

Q. I show you P-27, the agreement for the sale of the real estate between you and Hess, the other property which you were acquiring, and had not previously owned until the moment of the transaction, and a paragraph 6A is written in in ink.

A. Yes, that was written in that night. That was not a Sunday night. That was the night we met at his home.

Wait a minute. May I see that. I didn't see the exhibit. I may be confused. In the contract for Braeden Field, at his home, there were interlineations made. Oh, yes, this was written in that same—I believe it was written in the same night, although I see the names of Boyle and Walker here, and they weren't there that night.

Q. Could the agreement have been dated ahead?

A. What is the 12th of December?

Q. Do you mean what day of the week?

A. Yes. I don't know what day of the week that was.

Q. Well, the 12th of December, 1958, was a Friday.

A. Well, apparently. I don't know.

[fol. 261] Well, this may have been done in Mr. Hess' home, because I see Mr. Boyle and Mr. Walker were present, and they are his lawyers.

Mr. Kohn: Mark this P-28.

(Photostatic copy of Agreement dated December 11, 1958, was marked Plaintiff's Exhibit 28 for identification.)

By Mr. Kohn:

Q. I show you P-28, the agreement from Newhard to you for the same property. That is dated December 11, isn't it?

Judge Welsh: What year?

Mr. Kohn: 1958, sir.

The Witness: That is dated December 11.

Mr. Kohn: December 11, yes.

The Witness: Whether it was signed that date or not I don't know.

By Mr. Kohn:

Q. Well, actually they were signed on Sunday, December 7, weren't they, both of them?

A. Possibly.

Q. Just like the Fullerton Gallery slip, wasn't it?

A. It could have been—well, we had nothing to do with the Fullerton Gallery slip. That was your client.

Whether these were signed on the preceding or the sub- [fol. 262] sequent Sunda I don't know, and, as I say, this was a year after the Blue Laws problem arose, and, as a matter of fact, as in most lawyers' offices the date appearing on a document is not always precisely the date it is signed.

Q. Not only was the year after the Blue Laws controversy began, but it was a year to the day after you took title to the Braeden Field tract.

A. It could have been, I don't know. The only thing we were interested in was that six months had elapsed, because of the Federal Income Tax Laws.

Q. Now, actually, the part that you retained had a value—I am talking about a land value now—greater than the $3,000 figure you referred to in your direct testimony, didn't it?

A. I hope so. I hope it is valued at many times that. I don't know. Our accountant carries this on the books at $2,500 or $3,000, something like that.

Q. With Seventh Street frontage, is that right?

A. It is Seventh Street frontage. It is out in the Township.

Q. By the way, when Mr. Hess' deposition was taken you previously spoke about it to his attorney, Mr. Boyd Walker, didn't you, and told him that you wouldn't even appear, that Mr. Walker could handle it himself.

A. I wasn't handling the Commonwealth's side of the [fol. 263] case. I had no intention of going there. I was no witness. It wasn't indicated that I was to be a witness.

Q. Did that conversation take place between you and Mr. Walker, Mr. Hess' attorney, when Mr. Hess' deposition was taken in these proceedings about a month or so ago?

A. I don't recall whether there was such a conversation. I think he asked whether the District Attorney's office was going to be present and whether Mr. Rubin was going to be present. Mr. Rubin had intended to be present.

Q. He didn't talk to Mr. Rubin though, did he?

A. He talked to me.

Q. Yes.

A. And I told him that Mr. Rubin said that he would be present, and then I believe something happened that he couldn't be there.

Mr. Ritter was going to be present, but you people had changed it so often that it fell upon a day when it was impossible for him to be there for some reason.

Q. Well, Mr. Ritter was supposed to be there and never appeared.

A. I think the depositions were taken in Mr. Efron's office.

Q. No, they were taken in Mr. Hess' office.

A. Oh, I don't know that. They were scheduled for Mr. Efron's office.

[fol. 264] Mr. Rubin: And so the record will be clear, Your Honor, we agreed that Mr. Kohn could take Mr. Hess' deposition without my presence, and there was no objection to that.

Mr. Kohn: That is right.

Judge Hastie: Very well.

Mr. Ritter: So that the record will also be clear I was never given notice that they were to be taken in Mr. Hess' office.

By Mr. Kohn:

Q. Didn't Boyd Walker, after the meeting before Judge Lord go back and tell you where Mr. Hess' deposition was going to be taken and when?

A. No.

Q. Well, then, how do you account for the fact that Mr. Walker at the outset of the deposition had stated: I spoke to Mr. McGinley, who said he would not be here today, although he knew of the taking of the depositions at 2 p. m. this afternoon.

A. I knew depositions were to be taken and I thought they were in Mr. Efron's office. He asked me if I was going to be there, or whether the District Attorney's office or Mr. Rubin would be there. I told him that I had no intention of being there. If he could get Mr. Ritter that was up to [fol. 265] him. I didn't have any interest in what depositions were taken there.

I have a copy of them and I have never read them.

Q. There is and has been for many years in your County, has there not, a Fair known as the Lehigh County Fair?

A. Yes.

Judge Hastie: Before you go to another subject, about how much longer do you estimate your cross-examination will take?

Mr. Kohn: I should say, sir, a half hour. Not more than a half hour.

Judge Hastie: We will take a recess for five minutes.

(Recess at 11:30 a. m.)

By Mr. Kohn:

Q. Now, Mr. McGinley, there are now open and there have been open in Lehigh County for many years, both during the time you were District Attorney and before that, all kinds of sporting activities: golf?

A. Golf.

Q. Amusement parks?

A. Baseball.

Q. Bowling?

[fol. 266] A. Yes.

Q. You testified today that the reason you didn't enforce the law, or one of the reasons you didn't enforce the law against these activities was because you had inadequate personnel to be in all these places at one time.

A. Since the Blue Law problem arose in December of 1957.

Q. But you had personnel prior to December 5 if you wanted to go out to the golf course and arrest somebody?

A. There was no official notice brought to me that anyone was breaking the law in that respect.

Q. Now, in your deposition you never once mentioned the fact, did you, that you didn't have adequate personnel; all you told us there was that you thought people were entitled to recreation on Sundays.

A. I also agreed—think that is so. Rest and recreation I think I said.

Q. But you mentioned nothing in your deposition about inadequate personnel as the reason for not enforcing the law against sports?

A. You were asking the questions. I had no opportunity to ask the questions.

Q. I show you your depositions at Pages 63 and 67:

"Q. Did you ever go out to arrest anybody for playing golf?

"A. No.

[fol. 267] "Q. Why not?

"A. In my opinion health and recreation are vital and a necessity. And I think we are backed in that by the fact that the Legislature passed this Sunday baseball law, and fishing."

You didn't say a word about having inadequate personnel, did you?

A. No, you didn't ask me.

Q. I asked you why you didn't enforce the law against golf, which was the same question Mr. Rubin asked you today, wasn't it?

A. Well, I will stand on that answer.

Q. Now, the Mack assembly plant was open, wasn't it?

A. They are open to the degree that they are in operation, but they do not have their manufacturing personnel on; they have maintenance people there to keep the fires going.

Q. When did you visit the Mack plant?

A. I have never—I don't think I have ever been in the Mack plant.

Q. So you don't know actually what is going on in there?

A. I do know, because I know from public knowledge that that is so. We know that—I have gone past their plant on many Sundays, and there is nobody in the parking lot.

Q. You have gone by on other Sundays and you have [fol. 268] seen a lot of activity, haven't you?

A. No.

Q. Never?

A. I never saw any.

Q. How about the cement plants; have you gone by those and seen any activity there? Have you seen signs of activity of all kinds around the cement plants?

A. No, there is very little activity around. The only thing they have on are the personnel who keep the fires going and things like that.

Q. How about newspapers? The newspaper does print, doesn't it?

A. They print, yes. I don't know if they print on Sunday.

Q. And they sell?

A. They sell—they deliver on Sunday, or Saturday night, for Sunday.

Q. And in the newspaper appear ads by the Hess stores as well as other stores in that community? I show you Exhibits 22A and B, for example. Those are typical Sunday Hess ads?

A. Yes.

(Two pages from Sunday Call Chronicle, September 7, 1958, were marked Plaintiff's Exhibit 22A and Plaintiff's Exhibit 22B for identification.)

Q. In addition to those ads I show you Exhibits 23A and [fol. 269] B. Hess has ads in the Philadelphia Inquirer on Sunday, does it not?

A. I don't get the Inquirer. I don't know that.

Q. Is the inquirer circulated in Lehigh County to your knowledge on Sunday?

A. Oh, yes. If it is there I will admit that he does.

(A page from the Philadelphia Inquirer of December 7, 1958, was marked Plaintiff's Exhibit 23A for identification.)

(A page from the Philadelphia Inquirer of January 4, 1959, was marked Plaintiff's Exhibit 23B for identification.)

By Mr. Kohn:

Q. Why didn't you ever arrest the newspaper for publishing these ads either before or after December, 1957?

A. As I tried to explain before, first of all, it had never come to my official knowledge that they were in violation of the law, and I believe, besides that—and this is personal belief—that radio and the newspapers are vital to national defense, and we didn't want to get into an area where we would feel that the Courts would not uphold convictions of this type. We had a big enough problem without that.

Q. How does something come to your knowledge publicly, the phrase you used?

[fol. 270] A. Officially I said.

Q. Officially, how does something come to your knowledge officially?

A. If somebody calls and complains that the newspapers are publishing.

Q. Do you make an official record of such complaints?

A. No.

Q. Do you mean when a person complains that the law is being violated you make no notation or record in your District Attorney's office of that complaint?

A. Usually not. If it is the kind of a matter which is a summary matter we ask the person and explain that they can go to an alderman, and tell them they can't arrest on a Sunday, but if the violation is on a Sunday they should kindly go to an alderman the following day, and our office will help them if the matter is appealed into court.

Q. But you didn't do that in the case of Two Guys, you went out there with your whole staff and made mass arrests, didn't you?

A. The difference was that we were requested by the—

Q. By whom?

A. By the state, by the police from that area—their solicitor too.

Q. Do you have a written request?

[fol. 271] A. Yes.

Q. Or any written record showing such a request?

A. We have.

Q. Where is that?

A. It is in my file there.

Mr. Rubin: I think this is it. You can ask him.

By Mr. Kohn:

Q. How many times before have we asked you for th same material for which I am now asking you?

A. I don't recall ever being asked for that.

Q. You have never previously given us this letter, have you?

A. I didn't even know we had the letter until I looked through my file this morning on the way down here in the car and found that.

Mr. Kohn: Will you mark this letter.

(A letter from Ray R. Brennen, Solicitor, the Township of Whitehall, to Paul A. McGinley, District Attorney of Lehigh County, dated December 6, 1957, was marked Plaintiff's Exhibit 29 for identification.)

The Witness: I have told you that Chief Kline and Mr. Fritzinger had come to my office on the 7th of December, and actually they apparently called me as the result, and [fol. 272] I was aware that they were going to call me because of the letter which you have in your hands, which indicates they were going to call me.

Q. And you also told me that following the meeting of December 5 you had no communication whatsoever from Whitehall Township, didn't you?

A. No, I didn't say that.

Q. Well, let me read it to you.

A. I told you I had received a call from Whitehall Township.

Q. All right. Page 56—Pages 73 and 74, instead of 56. It reads as follows:

> The point is this—you are testifying: We had this meeting—December 5—there were some questions from the floor. The only question which indicated a possible lack of cooperation was from Mr. Brennen, who was Whitehall Township Solicitor, and from most

of them there wasn't any statement one way or the other.

And when the meeting was adjourned, most of them got up and walked out. A few came forward and asked questions.

Q. Then if the record shows, as Mr. Ritter says it does, that they promised you their fullest cooperation, the record needs correction as you have now corrected it?

[fol. 273] A. Well, I think their presence there and the atmosphere of the situation indicated we could expect their full cooperation.

Q. All right. Did you ever hear again from Mr. Brennen?

A. No. I think he lost out as solicitor.

Q. When?

A. I don't know when it was, but it seems to me that he was only solicitor up until the end of that month.

Q. Did you hear from anybody representing Whitehall Township?

A. Not to my knowledge.

A. When I made that testimony I had forgotten about this letter, which was dated, as you see, the 6th of December, is it? 1957, which is the—Mr. Brennen had indicated by some statements he made from the floor that we may not get complete cooperation. He did say they were going to have a meeting that night with the Township solicitor, or Commissioners.

This letter then came in the mail, dated December 6, 1957, in which they said that they had such a meeting, and due to the fact that I indicated there would be enforcement of the Act, they would cooperate.

[fol. 274] They told police, Luther Kline, the Chief—rather they told me that the Chief of Police would call "this date upon your office."

Two days later they did call and two days later he and Mr. Fritzinger, who was in charge of the Police Department in the Township, came to my office on Saturday, and we had our conference, in which they asked us to come in and help.

Q. Where does that letter say that they asked you to come in and help?

A. It doesn't state. This is the 6th of December. They didn't ask until—well, it was the 7th that they asked. They came to my office and asked cooperation. They asked us to bring personnel in.

As a matter of fact, it says here:

"The Commission Board has directed me to immediately inform you of its action as well as to give you whatever authority your office may need, if in your discretion help and assistance is necessary from the Pennsylvania State Police."

Q. Now, they didn't call you in; what they said in that letter, didn't they, was this, that they had a policy either of no enforcement of complete enforcement. Right?

A. That is right.

[fol. 275] Q. They also said that since you had decided on a policy of enforcement they are turning their police force over at your disposal to do what you want with it: isn't that right?

A. They didn't say that in this letter as far as I recall. I didn't read the whole letter.

Q. "In view of your"—your, McGinley's—"ordered strict enforcement of this law, the Board of Commissioners has unanimously acted and ordered the full facilities of the Whitehall Township Police Force at your disposal and available for direct instructions and orders by your office."

A. That is right; and they came and they explained to me they did not have enough personnel to carry out this problem. They told me they had over a hundred retail establishments open, they would need help from our office.

We said, well, we will give you that help.

Q. You are talking now about the meeting of December 7?

A. That is right.

Q. Which you did not recall when I examined you at Pages 73 and 74 of your deposition on July 27.

A. I recalled the meeting. I did not recall that I had heard from Mr. Brennen. I think I said that.

Q. Or any other Township officer?

A. I thought you meant solicitor.

Q. You didn't say that.

[fol. 276] A. I think you will find in my depositions that I told you completely about the meeting on December 7.

Q. Did you tell me about that letter?

A. I didn't know about the letter then. I had forgotten about it.

Q. Now, let me show you another ad, P-24, which appeared in the January, 1959, issue of a Lehigh Valley publication called Lehigh Valley's Great Boulevard Magazine, which has been marked as Exhibit P-24. I call attention to the ad in there which states:

Bauses's Super Drug Store, open every day including Sunday—in big type—9 a. m. to 11 p. m.

Gift Shop
Perfumes
Costume Jewelry
Infants needs
Toys, Dolls
Stationery
Hand Bags
Soda Fountains
Lunch Counter
Photo Supplies
Racks and Racks of Greeting Cards
7th Street Pike at Penn Fruit Building.

[fol. 277] Did you ever take any action on or about that time in response to that ad?

A. I didn't see the ad.

(January, 1959, issue of Lehigh Valley's Great Boulevard Magazine was marked Plaintiff's Exhibit 24 for identification.)

Q. Are you familiar with this publication?

Judge Hastie: What is the date of that publication?

Mr. Kohn: January, 1959, sir.

The Witness: All I can say is that that is a drug store. We have arrested them on innumerable occasions. They

are arrested for conspiracy, which has not been disposed of, and as far as we know they are complying.

I know on some occasions they had roped off their areas which sold perfumes and things like that.

Q. Now, continuing with some of the things that are sold on Sunday in Lehigh County to your knowledge: Christmas trees have been sold on Sundays, have they not, with your express permission?

A. Yes. I will tell you how that came about, too.

The florists got in touch with us and told us that they had many funerals on Mondays, viewings on Sunday nights, that they had to have their flowers delivered—

[fol. 278]

Q. I am talking about Christmas trees.

A. This is part of that. They carried Christmas trees also.

We figured that if you had your viewings on Sunday night and they wanted to have flowers fresh there for Sunday night we certainly could not say that they were not necessities. So we indicated to them that death being so final that perhaps the decedent ought to have the privilege of having fresh flowers around. So that is how that happened.

And then Christmas trees, which were perishable, also received the same classification from us.

Q. Would you tell me how the fact that Christmas trees, which are perishable, requires that they be sold on Sunday, when they are not to be used until some subsequent date, several days or even longer, after the Sunday on which they are to be sold.

A. I might remind you that we did not allow them to be sold until the last Sunday before Christmas. We had prohibited their sale.

Q. Let us assume that is correct. How does the fact that they are perishable, when Christmas is to come several days after Sunday, require that they be sold on Sunday?

A. We knew very well that the day after Christmas they would be worthless, and that some families would have to

[fol. 279]

buy them on Sunday.

Q. All right. Christmas in the year 1958 was—

A. 1957 I think was the year we were discussing.

Q. All-right. Christmas in the year 1957 fell on what day? It was a Wednesday, wasn't it?

A. I think it was Wednesday or Thursday.

Q. On Wednesday.

A. On Wednesday.

Q. The Christmas tree had to live at least until Wednesday, didn't it?

A. That is right.

Q. You permitted the Christmas tree to be sold on the preceding Sunday, the 21st, right?

A. We didn't permit it.

Q. Didn't you have a public statement that you were not going to prosecute people selling Christmas trees that you were going to allow Christmas trees to be sold?

A. We said we offered no immunity, in that public statement, to Christmas tree sellers. If people went out and wanted to arrest them on a summary offense they certainly could do it.

Q. Let us get back to the perishable point. A Christmas tree which was to be used on Wednesday, the 25th, what was perishable about that Christmas tree on Sunday, the 21st?

A. People were complaining that if they could not get [fol. 280] the trees into water they were going to be falling.

Q. Why couldn't the man who was selling the trees keep them in water on Sunday just as he would keep them in water on Monday and on Tuesday?

A. Most tree sellers had thousands of them.

Q. All right.

Now, gasoline stations were open, weren't they?

A. Yes.

Q. And still are?

A. Yes, under a case which we had. We didn't want to get into areas where the Courts had already spoken.

Q. Well, even where the Courts had already spoken and had sustained the Act; as in the case of baseball and the Sesquicentennial, you were not enforcing it against comparable activities, like golf and the amusement parks.

A. I have explained why.

We didn't have the personnel to get into every facet of the community to begin with

Q. You are still talking about after December 8?

A. Yes.

Q. So that so far as you are concerned until Max Hess ran that press release on December 2 you weren't the least bit interested in enforcing the Blue Laws?

A. Max Hess had nothing to do with the enforcement of [fol. 281] the Blue Laws as far as I am concerned, except in an indirect manner, in arousing public indignation to the point where we got the tremendous bombshell thrown in our laps and had to do something.

Q. Now, will you answer the question which I asked you: till December 2 you didn't do a thing to enforce the Blue Laws?

A. That is right. We had no problem.

Q. Aren't you supposed to enforce the laws as a public official, in the absence of what you have referred to as a problem?

A. If you will look at the County Code you will determine that the District Attorney's obligation is to prosecute cases which come before him. He must not go out and seek —he need not go out and seek law offenders.

Q. You started to say "he must not."

A. He need not.

Q. But this was an exception.

A. This became a tremendous exception. It is probably the most volatile thing that has come into our community since the day I was born.

Q. I show you exhibits marked 21A to P, which are pictures taken at the current Lehigh County Fair which was held during September of this year. These pictures were [fol. 282] taken on Sunday, September 20, 1959. Have you ever visited the Lehigh County Fair?

A. Yes.

(A group of pictures was marked Plaintiff's Exhibits 21A to P, inclusive, for identification.)

By Mr. Kohn:

Q. Do you know that all sorts of activities go on there on Sundays and have for many years?

A. Yes, sir, that is right.

Q. Do you see a woman actually with a dollar bill in her hand buying something?

A. I don't know if she is buying something or not.

Q. Don't they sell things at that fair?

A. In September of 1958 the concessionaires were told to sell nothing except those items which were considered necessities.

Q. Now, this lady—

A. By not only the law enforcement people but by the officials of the Fair.

As a matter of fact, this year there were prohibitions against running rides and things, I am told by the Fair officials.

Q. Here is a lady with a dollar in her hand buying a DuPont product.

A. How do I know? I don't know if it is a posed pictur[illegible] [fol. 283] or what it is.

Q. Well, weren't you at the Fair? Don't you ever go? Didn't you send your County detective there?

A. I was around the Fair Grounds that day. I wanted to see whether they were obeying the law or not.

Q. Did you see this gentleman who has pictures or paintings with a dollar price tag on them?

A. No, I didn't see that. I don't know if he has got them for sale or not.

Q. You think he is just taking orders for those dollar pictures?

A. The Fairs last for a full week. He might have been advertising his wares.

Q. Do you see this one labeled "Novelties and Souvenirs," directly in the words of the 1959 Act? Did you see that when you were there?

A. I see that there and I also saw a Two Guys stand right in the same area.

Q. Did you see anybody playing Bingo?

A. Not on Sunday. They weren't open.

Q. Are you sure of that?

A. I have been informed by the Fair officials that they were required to close. One opened momentarily and was then promptly closed.

[fol. 284] Q. Were you or were you not at the Fair Grounds on the Sunday in September when the Fair was actually in operation?

A. This year?

Q. Yes.

Judge Hastie: Is this 1959?

Mr. Kohn: 1959, this year.

The Witness: Yes, I was.

By Mr. Kohn:

Q. Did you or did you not see the Bingo game?

A. I saw closed stands, but they were not open.

Q. Did you see anybody playing Skillo out there?

A. No.

Q. You did not? Did you visit the Skillo booth on Sunday?

A. No. I had my children with me, I wasn't interested in that.

Q. So that you don't know that whether they were playing Skillo, despite the fact that you were out there.

A. I am not saying that I knew they were not. I am saying I didn't see them.

Q. Did you see this gentleman selling hats, ice cream and that sort of thing?

A. No.

Q. Your children would be interested in that, wouldn't they?

[fol. 285] A. They weren't that day, they wanted to go and see the pigs and the cows.

Q. Did you see the booth where they were selling all sorts of children's socks, underwear and so on?

A. No, I don't think so.

Q. You didn't see that either?

You didn't see the people selling hats and hand bags?

A. I didn't see any and I don't know whether they were selling any or not.

Q. You didn't see the people selling toys?

A. No.

Q. Did you see the exhibits of sewing machines?

A. No.

Q. Or farm machinery?

A. I saw farm machinery. There weren't any sales, but our children climbed all over the farm machinery. There was nobody selling it, it was just on exhibition.

Q. Did you see the Trade Wind Specialty Shop?

A. No.

Q. Is what I have shown you here appreciably different from what went on at that Fair in prior years, to your knowledge?

A. In prior years, I do know in 1958 they had a directive [fol. 286] not to allow the sale of any of that.

Q. Do you know what actually went on?

A. It was reported to me by the police that the only things that were sold were food and things like that, ice cream, hot dogs.

Q. But you weren't there yourself?

A. I didn't go there that year.

Q. You were called on November 24, 1958. There was called to your attention a long list of sales and purchases which had been made by shoppers for Two Guys through all of Lehigh County, and you wrote—

A. We got lists on a number of occasions.

Q. I am asking you about a specific one. It was immediately before the injunction hearing before Judge Grim, and you sent Mr. Efron this letter which we will mark as the next exhibit.

Mr. Kohn: Will you mark these at the same time.

(A letter from Paul A. McGinley, District Attorney, to Morris Efron, Esq., dated November 24, 1958, was marked Plaintiff's Exhibit 30 for identification.)

(Shopping records were marked Plaintiff's Exhibit 31 for identification.)

(Shopping records were marked Plaintiff's Exhibit 32 [fol. 287] for identification.)

By Mr. Kolin:

Q. (Continuing) In that letter to Mr. Efron you state:

"Thank you for your letter of this date concerning purchases made at various establishments.

"We request your agents whom you tell us are available to proceed to an alderman of their choice and to swear out an appropriate information leading to the arrest of the alleged violator.

"Please keep this office informed as to what alderman you are using since we want to cooperate fully by sending proper information forms to them.

"In the event of appeals from any convictions this office will be very happy to cooperate fully by handling the appeal as far as the Commonwealth is concerned."

But you didn't actually send any of your people out to make arrests as you did in the Two Guys case, did you?

A. As I said, we were requested to come into Whitehall Township by the police.

Q. No, answer this question. Did you send anybody out to make any arrests in response to this list of violations you received on November 24, 1958?

[fol. 288] A. In keeping with our policy we never, against Two Guys, or against aayone else, brought any arrests on information received, we wanted the person who saw the violation to swear to the information, and to go to the alderman and to cooperate with us.

Q. You don't mean never, do you? At Two Guys, you didn't even have, so far as Two Guys were concerned, any of the information that Two Guys furnished you with regard to all these other stores, did you?

A. I am talking about the fact that never in these proceedings have we ever brought any proceedings on information received. That is a technical term used in the District Attorney's office. Which means that you sent somebody else out other than who saw the violation to make the information with the alderman.

Q. Now, this was an official complaint, wasn't it?

A. It was.

Q. To you in your official capacity?

A. This was about the seventh or eighth of these letters which I had received from Mr. Efron, and which on every occasion I had asked that he have his people cooperate and go and swear out informations against these people.

Q. But you didn't ask any of the people who called you about Two Guys to go to their alderman and swear out [fol. 289] warrants and you would then prosecute them on appeal, did you?

A. The police from that Township had asked us to come and to cooperate and to be of assistance, and we answered that in the manner in which we did.

Q. Now, Nestor's Sporting Goods Store was in Whitehall Township, was it not?

A. That is right.

Q. And here was a complaint in which you had a statement that somebody had bought a pair of gloves at Nestor's in Whitehall Township, where you had been requested by the police, you say, to enforce the Blue Laws; why didn't you go out and arrest somebody pursuant to this information on November 24?

A. We sent our detectives to as many of these places as we could.

Q. Did you send anybody to Nestor's on November 24?

A. They were directed to go there every Sunday. Nestor's was open and closed on a couple of occasions and we had our eye on them, and we did arrest them on a number of occasions, brought conspiracy charges against them.

Q. Now, this is the list of items, is it not, P-31 and P-32 in which in each case they tell you precisely what they bought and describe the clerk from whom the article was bought?

[fol. 290] A. I got nothing like that from them.

Q. Nothing?

A. All I got was a typewritten list, naming a store, and an item purchased and the date.

Q. And you find in each case, don't you—

A. But you are asking me if they gave me this information. I have never seen this before.

Q. Well, you did. You saw it in court on the 25th of November, didn't you, 1958?

A. This?

Q. Sure you did. It is marked as an exhibit.

A. Not to my recollection.

Q. Weren't you before Judge Grim in the courtroom that day and wasn't Mr. Ritter conducting the proceedings?

A. Mr. McBride and Mr.—

Q. Yes.

And I show you the mark "PS-1" on there. Wasn't that introduced in that hearing as an exhibit?

A. It may have been. I don't recall seeing it.

Q. And you don't recall that it was actually a part of the record which went up to the Court of Appeals in this case?

A. It may be. I have never seen it to my knowledge.

All I am trying to point out is that Mr. Efron never sent me this kind of information that is in this document.

[fol. 291] Mr. Kohn: Would you mark this, please.

(Letter from Morris Efron to Paul McGinley, Esq., dated November 24, 1958, was marked Plaintiff's Exhibit 33 for identification.)

(List entitled "Business Establishments Shopped on Sunday, November 24, 1958, was marked Plaintiff's Exhibit 34 for identification.)

By Mr. Kohn:

Q. I show you Plaintiff's Exhibits P-33 and P-34, which were the letters from Mr. Efron and the enclosure also dated November 24, to which you replied in P-30. Doesn't that list every one of these places on it?

A. It lists an inanimate store or something; it doesn't say who sold it; it doesn't give the name of the person who sold it. It says "B. & S. Cigar Shop," "Gould Pharmacy," things like that. We have no information given to us as to who the person was who allegedly disobeyed the Sunday sales law.

Q. Doesn't he say that if you want any further information the individuals who made the purchases are available

and subject to call; and, as a matter of fact, those people were actually in the courtroom on the 25th, weren't they?

A. I have no idea. I don't know any of these agents.

Q. Weren't you in the courtroom when we told Judge [fol. 292] Grim that these are the shopping records and that the three young ladies who did the shopping were sitting in court in case anybody wanted to call them and question them?

A. I think there were people here, but I did not know who they were. I mean I heard you say that they were here and available, but, as I say, we couldn't proceed with anything like this.

First, for our policy, we couldn't proceed on information received in a summary case, which is against our policy.

Secondly, they named no person who allegedly violated the law, and we felt that if Two Guys from Harrison wanted to cooperate in having the law enforced, that the least they could do was to have the very people who had seen the alleged infractions go to the alderman's office, swear out the information and let our office take it up from there. We would have been very happy to cooperate.

As a matter of fact, I even asked them to provide help in the Two Guys store, which, of course, I received no—

Q. As a matter of fact, in a number of cases, they do give you information, even in the letter itself which they sent you about purchases from one-man stores.

I call to your attention P-9 and P-6, and show you the [fol. 293] Pagano sale, Elvin Ramer, Anthony Scotta, and R. G. Neff.

Now, don't you know that those are one-man operations?

A. I don't know.

Q. There is no company listed.

A. It just says V. Pagano, 240 East Hamilton Street.

Q. And it says what they bought.

A. Floor wax.

I may state that practically everything that was listed on there was being sold in the drug department at Two Guys, which we did not go into their drug department. The drug department is like in so many of these stores, that they sell everything practically under the sun, and it was

the same kind of thing that was being sold in the drug department, which wasn't bothered at Two Guys.

Q. Was that the reason you did not enforce it against these people, or was it because you didn't know who they were, or is it some other reason?

A. The reason, I have explained, we asked these people, asked Mr. Efron, to please have his people cooperate with us, swear out the information, and we would cooperate. We never received the cooperation.

Q. Why didn't you ask Mr. Hess to have his people go [fol. 294] out and swear out informations for the people selling things at Two Guys?

A. Mr. Hess never spoke to me about this thing.

Q. Did his attorney?

A. The attorney called me the afternoon of the meeting which I have talked about, in which he said that they didn't know whether they were going to be open or closed, but they would let us know later on. And then they came out with a newspaper advertisement—

Q. He was actually at the meeting on the 5th, wasn't he?

A. Pardon?

Q. He was actually at the meeting on the 5th?

A. I think he was at our meeting.

Q. Yes, but why didn't you tell him to go out and arrest people before an alderman and you would prosecute the appeals?

A. We hadn't received any word from Mr. Hess. We got it from everybody in the County I believe.

Mr. Kohn: That is all.

Mr. Rubin: That is all.

Judge Welsh: Mr. McGinley, in the hundreds of complaints which came in or the scores of complaints which came in, whichever it may be, about the violations, were they confined largely to violations by the Two Guys, or [fol. 295] were they pretty well scattered?

The Witness: No, the complaints were along these lines: Hamilton Street is going to open up. What are you going to do about it? Two Guys were out in the Township.

Their complaints were general: We don't want this thing to get out of hand. We don't want to allow the main street

of the City of Allentown and the various discount houses in the area to destroy the Sunday as we are accustomed to observing it.

Judge Welsh: Was it your feeling that this hue and cry, if we may call it that, was raised because these other stores, having volunteered to open up, in addition to the Two Guys, would precipitate a great desecration of the Sabbath or a great number of violations of the law?

The Witness: Well, the latter is the case. I don't view this as a religious act at all. I could see the law enforcement was breaking down and I had to do something.

Judge Welsh: What I would like to know is whether this multiplicity of calls was brought about by just the Two Guys keeping open and selling, or whether it was brought about by the increase of other stores who threatened to do the same thing?

The Witness: From the time the Two Guys opened in [fol. 296] October until early December I hadn't heard any complaint, and it was only after this Max Hess store began to say they were going to be open and everybody else was announcing they were going to open, that the problem began to mushroom and expand tremendously, and we got all this kind of pressure.

Judge Welsh: Did it seem to be some concerted action on the part of these other stores in volunteering to be open?

The Witness: They had a meeting, yes. There was a meeting in the Americus Hotel, at least one, I think there were two, in which the merchants had a meeting that they were going to open if these other discount houses were allowed to open.

There were also meetings by the Chamber of Commerce; there were marches on City Hall; there were labor union representatives who came to see us.

Judge Welsh: Were they in agreement in that expression that they would open?

The Witness: The stores?

Judge Welsh: Yes.

The Witness: I think thirteen had announced they were going to open on the main street of the City of Allentown who normally had never been open in the history—

Judge Welsh: It raises a question that I think might be [fol. 297] very important, whether this might be an agreement—I don't like to use the word conspiracy, but an agreement to violate the law unless something was done by you in your official capacity.

The Witness: That is what it amounted to.

Judge Welsh: You had a firecracker by the tail.

The Witness: They had a concerted program and they said if we didn't do something they were going to open.

Judge Welsh: Thank you.

By Mr. Kohn:

Q. Yet you say that none of these people in the stores came to you and asked you to enforce this law, so you say.

A. You mean before December 5?

Q. Yes.

A. No. But after December 5 the Committee from the Chamber of Commerce came to me.

Mr. Rubin: Your Honor, the defendant has nothing else that he wishes to introduce in evidence.

We had discussed yesterday this problem of the hearing before the General Assembly's Rules Committee on the 1959 Act.

Our feeling about it is this, that it is not the type of [fol. 298] matter that we feel should become part of the record for the Court to be burdened with.

Judge Hastie: Of course, the Court will take judicial notice of what is presented there.

Mr. Rubin: It is a public record. If the Court wants to refer to it we have a copy which the Court may have. Let it go at that.

Mr. Kohn: Is that the end of your case?

Mr. Rubin: Yes.

Plaintiff's Evidence (Continued)

Mr. Kohn: Mr. Stranzl.

Judge Hastie: Is this a continuation of your case in chief?

Mr. Kohn: Well, I think actually we do not really need this witness, if they will give me the right to read two pages of a deposition into the record, without actually calling the man. He is in court, so I have no right to do that, unless they agree.

Judge Hastie: Is there any objection to that?

Mr. Rubin: What are the pages?

Mr. Kohn: Pages 3 and 4.

Is that all right, Mr. Rubin?

[fol. 299] Mr. Rubin: Sure.

Mr. Kohn: I would like to read the following into the record:

"By Mr. Kohn:

"Q. Will you give your name and address for the record?

"A. Frank J. Stranzl, Front Street, Coplay, Pennsylvania.

"Q. How long have you been a county detective?

"A. Three years and seven months.

"Q. Did you come into office at the same time Mr. McGinley did?

"A. Yes, sir.

"Q. Did you know anything about the Sunday Blue Laws in Pennsylvania prior to December of 1957?

"A. No, I did not.

"Q. Did you know there was such a law?

"A. I have heard of it, yes, but never been into it.

"Q. Did you notice that businesses of various kinds were being conducted in Lehigh County during 1956? That is, on Sundays?

"A. When I went down the highway, I saw a bit of it, yes.

[fol. 300] "Q. And it never occurred to you that you should arrest any of those people?

"A. No, sir.

"Q. Did it ever occur to you that you should report it to Mr. McGinley?

"A. No, sir.

"Q. When did it first come to your attention that the Blue Law was something which was to be enforced in Lehigh County?

"A. Why the day of the meeting. That is, December 5."

Mr. Kohn: Mr. Hubschman, please.

GEORGE HUBSCHMAN, recalled.

Direct examination.

By Mr. Kohn:

Q. You have previously been sworn in this matter and you testified yesterday.

A. Yes.

Q. I show you Exhibits 21A to P and ask you if you are personally familiar with those pictures, observed the scenes which are pictured, what day of the week and where it took place.

Judge Welsh: What year first.

[fol. 361] By Mr. Kohn:

Q. What year, what day of the week and what day. Look at them all.

A. These pictures were taken on the Sunday of the opening of the Allentown Fair. They were taken by a photographer at my direction and I told him which shots to take and these are they.

Q. Were you there?

A. Yes, I was.

Q. Do the photographs correctly portray what you and he observed?

A. Yes.

Q. When was that?

A. September 20 I believe.

Q. Of what year?
A. Of this year.
Q. 1959?
A. 1959.
Q. I also show you the exhibits which have been marked P-31 and P-32.

Were those shoppings made by people under your supervision and at your request?

A. Yes, I had instructed them to go out and make these shoppings.

[fol. 302] Q. And they are people employed by you?

A. That is correct.

Mr. Kohn: That is all.
Judge Welsh: What was that date?
The Witness: This would be the 23rd.
Mr. Kohn: November 23, 1958.
September 20 was the date of the Fair, sir.
Judge Hastie: This is a year earlier.
Mr. Kohn: November 23, 1958.
Judge Welsh: Thank you.
Mr. Kohn: That is all, sir.
Judge Welsh: That is a Sunday.

Mr. Kohn: If Your Honors please, I think after Mr. McGinley's testimony that we can get enough from Mr. Hess' deposition, if they will agree that the deposition can be put in in the absence of Mr. Hess, to close this case without keeping it open until Mr. Hess returns.

Now, there are some exhibits which were identified in Mr. Hess' deposition, which was taken on August 26; to this day his attorney, despite repeated requests from us, has failed to furnish us with the photostatic copies of those exhibits. Those exhibits are included within the subpoena for Mr. Hess to testify in these proceedings.

[fol. 303] Judge Hastie: What is the nature of these exhibits?

Mr. Kohn: For example, the deed from Mr. McGinley to Mr. Hess is among those papers.

Judge Hastie: Do they involve matters that are important or disputed?

Mr. Kohn: I think we ought to have that deed in the record, sir. I really do.

And there are certain newspapers clippings, which I do not think we need, I think we got in the six clippings, the history of what occurred that week.

There are certain memoranda in Mr. Walker's own handwriting of conversations he had with Mr. McGinley about the enforcement of the Blue Laws, which I do think we ought to put into the record.

So if it is agreeable, sir, so that we can close the record now and not keep it open for further testimony, we can this afternoon read into the record those parts of Mr. Hess' testimony that we think now are perfectly adequate, leaving the record open only for the purpose of furnishing certain physical written documents later on, when Mr. Hess returns.

Judge Hastie: If that is the only matter that remains I would suggest that we recess for luncheon now.

[fol. 304] Counsel can get together and see if they can agree on the matter of the deposition and how and when these exhibits that you want will be made available, and if an agreement can be reached we can proceed on that basis this afternoon. If not, the Court will have to make some ruling.

Mr. Kohn: As to the exhibits they are in Mr. Hess' possession and control.

Judge Hastie: They are not in the possession of counsel. I thought they were.

Mr. Kohn: No. He has not signed his deposition, but I take it that they would be willing to dispense with that formality, as would I, if we can get out of it certain parts, or we will have to leave the record open, but I trust it will not be necessary to subpoena the man, to get him here physically to bring those records down. As you know, he is out of the jurisdiction for a couple of weeks.

Mr. Rubin: Of course, Your Honor, we have no control over Mr. Hess.

We are perfectly satisfied that all of this material be presented, and if we could get Mr. Hess to give you this material we would. We do not have that power.

Secondly, if it is desired to introduce this entire deposition we have no objection and that would save the problem of picking out what was wanted.

[fol. 305] Mr. Kohn: It would be unfair to the Court to impose 137 pages on the Court.

Judge Hastie: I suggest that we recess now until two o'clock.

Mr. Kohn: Very well.

Judge Hastie: The Court is recessed until two o'clock.

(Luncheon Recess 12:20 p. m. to 2 o'clock p. m.)

Afternoon Session

(Appearances as previously noted.)

Mr. Kohn: If the Court please, the portions of the deposition of Mr. Hess which we should like to offer in evidence—and I may say, sir, that this is being offered as the evidence of a hostile witness; in other words, not all of it is offered by us as if we called the man for the truth of what he says there—and I will not read it, I will merely refer to the pages and ask the court reporter to incorporate in the record, and refer in our brief and oral argument to such portions of it as we think are material—it is a total of about twenty-four or twenty-five pages:

Page 3, Line 14, to Page 4, Line 22.
Page 16, Line 1, to Page 17, Line 15.
[fol. 306] Page 18, Line 12, to Page 19, Line 15.
Page 23, Line 7, to Page 27, Line 2.
Page 31, Line 20, to Page 32, Line 10.
Page 33, Line 4 alone.
Page 52, Lines 19 to 24.
Page 94, Line 16, to 98, Line 12.
Page 102, Line 21, to 103, Line 12.
Page 104, Line 11, to 106, Line 15.
Page 107, Line 9, to Page 128, Line 11.

(The portions of the deposition of Max Hess offered by plaintiff are as follows:)

Page 3, Line 14 to Page 4, Line 22:

"Max Hess—Sworn

"Q. Will you give us your full name and address, please?

"A. Max Hess, 2643 Livingston Street, Allentown, Pennsylvania.

"Q. What is your occupation?

"A. Retailer.

"Q. With what firm or firms are you associated?

"A. Hess Brothers.

"Q. In what capacity?

"A. President.

"Q. Are you also a stockholder and director?

"A. Yes.

"Q. Are you the principals stockholder?

[fol. 307] "A. Yes.

"Q. How long have you been associated with Hess Brothers?

"A. Oh, as long as I can remember I've been coming into the store.

"Q. Well, twenty years, thirty years, ten years—what?

"A. Oh, at least. After school I used to work in the store.

"Q. Well, when was that?

"A. I don't know. I can't remember how long.

"Q. Well, have you been associated with the store for twenty-five years?

"A. At least.

"Q. And in an executive capacity during that time?

"A. No.

"Q. When did you first become president?

"A. Maybe when I was—I don't know exactly—maybe twenty-two.

"Q. How old are you now?

"A. Forty-seven."

Page 16, Line 1 to Page 17, Line 15:

"A. We wanted all the stores to close on Sunday.

"Q. Well, if you wanted all the stores to close on Sunday, why did you advertise that you were going to open on Sundays?

"A. This was the most forcible way to bring it to the public.

[fol. 308] "Q. Would you mind telling me this? You wanted the public to do what at that time, in the fall of '57?

"A. We wanted the public to understand about Sunday opening.

"Q. So you said you were going to open on Sunday?

"A. Yes.

"Q. Now, what effect was that supposed to have on the public?

"A. To have the effect to close the stores on Sunday.

"Q. You mean to close somebody else?

"A. No, to close all the stores.

"Q. Well, why would your advertising that you were going to stay open on Sunday cause other stores to close on Sunday.

"A. Not the other stores to close—that everybody closes on Sunday.

"Q. What do you mean everybody?

"A. All the stores.

"Q. That is what I said: other stores.

"A. All stores.

"Q. All right, all stores. Why was that supposed to, [fol. 309] your opinion, cause all other stores to be closed on Sunday?

"A. Because it would forcibly bring it to a head.

"Q. Well, why? Stores had been open, had they not, in Allentown for many, many years on Sunday, right?

"Mr. Walker: I object to that. I don't think—

"Q. (Interposing) Do you live in Allentown?

"A. Yes.

"Q. Do you walk around on Sunday, drive around on Sunday, see what goes on on Sunday?

"A. Yes.

"Q. And you have done that for many years?

"A. Yes.

"Q. Have you observed stores open on Sunday in Allentown?

"A. Yes."

Page 18, Line 12, to Page 19, Line 15.

"Q. Have you ever noticed any furniture store open on Sunday?"

"A. I have never seen a furniture store open.

"Q. Have you ever heard of a furniture—

"A. (Interposing) Yes, I have heard they have been open, but I have never seen so for myself.

[fol. 310] "Q. How about sporting goods stores?

"A. Well, I have understood they are open.

"Q. Gasoline stations?

"A. Yes, gasoline stations.

"Q. And the gasoline stations, I suppose, in this area, sell tires, batteries, spark plugs, cleaning fluid, and other stuff on Sunday, the same as they do elsewhere?

"A. I never go to a gasoline station. I get all my car stuff at the store.

"Q. Did you ever drive by a gasoline station?

"A. Sure.

"Q. And as a merchant, don't you make an effort to see what other merchants are doing in the community?

"A. We try to.

"Q. And when you, for example, run a big ad, as I see you have illustrated, of tires at a certain price, you certainly make an effort to find out what other tire people are doing?

"A. Oh, surely.

"Q. And you know very well, don't you, that service stations have been selling tires in this area on Sunday for many, many years?

"A. I imagine so. I mean, if you ask me point blank [fol. 311] which ones sell tires, I don't know."

Page 23, Line 7, to Page 27, Line 2:

"Q. Now, what led you, at that time, to embark upon this drive to close stores on Sunday?

"A. Well, we wanted to keep Sunday sales out of the picture.

"Q. Why did you decide to do that in December of 1957 and not in December of 1956 or August of 1953 or some other time?

"A. Because this seems to be a growing trend throughout the country at this time. It just seemed like the right time to do it.

"Q. Because of the growing trend throughout the country?

"A. Throughout the state of Pennsylvania.

"Q. Where in the state of Pennsylvania? What, for example, happened in Philadelphia in the fall of 1957 which led you to begin this campaign?

"A. I can't remember exactly what, but the trend has been here.

"Q. Name me any place else in Pennsylvania that anything happened by way of a development in Sunday selling in the fall of 1957, which led you to embark upon this [fol. 312] public campaign.

"A. Well; the trend has been here and this we thought was the opportune time.

"Q. Why was that the opportune time?

"A. This would bring it forcibly to the people.

"Q. I understand you wanted to bring forcibly to the people that stores should be closed on Sundays, but why did you pick this particular time?

"A. Because this was right before Christmas.

"Q. Why before the Christmas of '57 instead of before the Christmas of '56 or '55?

"A. We thought this was the right time.

"Q. Why?

"A. I told you.

"Q. No, I don't think you told me.

"A. I said, we figured this is the right time to do it.

"Q. I am asking you, what led you to the decision this was the right time.

"A. Because this thing was coming to a head, and all these places had been opening more and more articles were in the newspapers; this was as opportune as any time.

[fol. 313] "Q. Can you show me any articles in newspapers that you had clipped out, with regard to Sunday selling?

"A. I am sure we didn't keep those.

"Q. Why did you begin to keep them in December of '57?

"A. Well, this is when we decided to open up.

"Q. Then you are unable to give me any more specific answer as to what occurred in the fall of '57 that led you to embark upon this campaign against Sunday selling, other than what you have already told me during this deposition?

"Mr. Walker: He has been into that three or four times here. I think he has answered the question on more than one previous occasion.

"Mr. Kohn: I can hardly believe, Mr. Walker, that you really mean what you say.

"Mr. Walker: He has answered your question.

"Q. Do you know if anything happened in or around Allentown in the fall of '57 which led you to embark upon this campaign?

"A. Yes, if our people in the store—we have all thought that this was the right time to bring this thing forcibly to a head.

[fol. 314] "Q. And you had no idea as to what led all of you to that decision?

"A. Yes.

"Q. What was it?

"A. It was public opinion that this was the time to once and for all bring it to the public, to see whether they wanted Sunday selling or not.

"Q. And what expression of public opinion can you point out?

"A. Well, here are some. After we made the announcement—

"Q. (Interposing) No, after you made the announcement can hardly have influenced you to make it, Mr. Hess.

"A. Here. 'Clergymen, labor leaders—

"Q. (Interposing) On what day?

"A. Well, according to this, it is December 3.

"Q. The day after you made your announcement?

"A. Evidently.

"Q. Evidently. Now, what occurred before you made your announcement that gave you and your people in the store suddenly the idea that public opinion was outraged by Sunday selling and that you should be a leader in the campaign to stop it?

[fol. 315] "Mr. Walker: I object to that. He has never testified that public opinion was outraged. I think that question is unfair. If you will rephrase it, I will let him answer it.

"Q. What can you point to as a manifestation of public opinion prior to this announcement on December 2 that led you to believe that you should lead this drive?

"A. It was our thinking that this would be the best time to bring this right out in the open, and right before Christmas.

"Q. You can't be any more specific?

"A. Well, this is specific."

Page 31, Line 20, to Page 32, Line 10.

"Q. By the way, what are the department stores in Allentown?

"A. You have Sears Roebuck; H. Leh and Company and Zollinger-Harned Company.

"Q. Any others?

"A. No.

"Q. What, in your opinion, is the approximate annual volume of Zollinger-Harned?

"A. I imagine they do about $4 million.

"Q. A year?

[fol. 316] "A. A year.

"Q. And how about Leh?

"A. I'd say they do closer to six, maybe.

"Q. How about Sears?

"A. I'd say they do about six or seven.

"Q. How about Hess Brothers?"

Page 33, Line 4:

"Q. We did practically $30 million."

Page 52, Lines 19 to 24:

"Q. And you guide your own policies, at least to some extent, in the light of what they do?

"A. We set our policies.

"Q. And you consider what your competitors do in setting them, do you not?

"A. No, they follow us."

Page 94, Line 16, to 98, Line 12:

"Q. Did you ever hear of a gentleman named Irving Coleman?

"A. Yes.

"Q. Who is he?

"A. He is an attorney in town.

"Q. What?

"A. He is an attorney in town.

"Q. Did you ever discuss the question of the Sunday [fol. 317] Blue Laws with him?

"A. Could have.

"Q. Can't you be a little more specific?

"A. I say I could have.

"Q. Can't you be a little more specific? Did you?

"A. I don't know.

"Q. You have no recollection?

"A. I say I could have.

"Q. And did you?

"A. I could have.

"Q. And do you know what you could have discussed with him.

"A. Like what?

"Q. Well, like what? I'm asking you. You are supposed to answer the questions for me. I am not supposed to give you the answers. See, it is not a game. You are supposed to tell me everything that you know that I ask you about, whether you know or think that I know the answer or not.

"Mr. Walker: He is doing that. He is answering your questions to the best of his recollection.

"Mr. Kohn: Yes.

"Q. All right. Now, you tell me what you talked to Mr. [fol. 318] Coleman about in late '57 or early '58, with regard to the enforcement of the Sunday Blue Laws.

"A. Well, Mr. Coleman, I happen to be very friendly with him. He is a personal friend of mine.

"Q. Go ahead.

"A. I could have discussed a lot of things with him.

"Q. I know you could have, but I am asking you to tell me one narrow segment.

"A. After all, I see him quite often and we discuss a lot of things.

"Q. Did you discuss his starting any lawsuits in connection with Sunday operations?

"A. No.

"Q. Are you sure?

"A. No.

"Q. Positive you didn't discuss that?

"A. Of course not.

"Q. Did you know whether he did start a suit?

"A. I wouldn't know.

"Q. You never heard he started any suit having anything to do with Sunday Blue Laws?

"A. I wouldn't know.

"Q. This close friend of yours never mentioned that to [fol. 319] you?

"A. I don't know his law business.

"Q. Do you know whether he started suit on his own behalf as a principal?

"A. I wouldn't know.

"Q. You never heard of that?

"A. I wouldn't know of any.

"Q. Never read about it, never were told about it by Coleman?

"A. He could have told me.

"Q. Did he?

"A. I don't remember it.

"Q. And you don't to this day know whether such a suit was ever started?

"A. It could have been.

"Q. You could have known such a suit was started?

"A. He could have told me.

"Q. I am asking you now, was such a suit ever started by Coleman, a suit with regard to Sunday operations, against anybody?

"A. It could have been.

"Q. And it could have been a stockholders' suit against Two Guys from Harrison?

[fol. 320] "A. This I don't know.

"Q. Well, as a matter of fact, you do know, don't you?

"A. No. I don't know.

"Q. Do you know that such a suit was ever started?

"A. I don't know of any.

"Q. You never read about it?

"Mr. Walker: He has already answered the question repeatedly.

"Mr. Kohn: He remembers a little more each time.

"Mr. Walker: He said it could have, and he doesn't have any present recollection.

"A. I told you I am very friendly.

"Q. Do you have any recollection now as to whether Mr. Coleman ever started a suit, stockholders' suit, against Two Guys from Harrison?

"A. I don't know of anything. He could have.

"Q. Do you recall reading about any?

"A. Not that I recall.

"Q. And you don't recall talking to him about any such suit?

"A. He could have, but I don't know."

[fol. 321] Page 102, Line 21, to Page 103, Line 12:

"Q. Did you ever talk to Mr. McGinley about the Sunday Blue Laws? You personally?

"A. Yes, when he called up here and said he was going to close down.

"Q. Did you speak to him?

"A. Yes, I think I spoke to him.

"Q. What was the conversation?

"A. Something that he was going to prosecute if we didn't close.

"Q. And what did you say?

"A. We'd be very happy to cooperate. Something like that.

"Q. Was that the whole conversation?

"A. Could have been a little more, a little less. I don't know.

"Q. That is all you remember?

"A. Yes. About that. That was about it."

Page 104, Line 11, to 106, Line 15:

"A. We bought the property out here from him.

"Q. What property?

"A. On 7th Street.

"Q. When did you buy that property?

"A. The date?

[fol. 322] "Q. Yes.

"A. I don't remember the date.

"Q. When did you first learn it was for sale?

"A. That I don't know either.

"Q. When did you first become interested in the property?

"A. Well, see, my father-in-law has the Allentown Portland Cement Building out in 7th Street, and he'd been talking to me about this property being a good location.

"Q. What is his name?

"A. Alfred Douglas.

"Q. And do you know when he—

"A. (Interposing) Oh, quite some time.

"Q. Four or five years ago?

"A. No.

"Q. How long ago?

"A. I don't know.

"Q. Well, was it before or after the Two Guys from Harrison opened?

"A. This I don't know. I think his plant was built before. I am not sure.

"Q. What kind of plant is it?

"A. It is an office building.

[fol. 323] "(Discussion off the record.)

"Q. Where is that located?

"A. It adjoins the property that we now own.

"Q. And do you know when his office was built?

"A. No. I don't.

"Q. Was it built before Two Guys from Harrison was built?

"A. I think so.

"Q. Was it soon after his office was built that he told you about this property?

"A. It was after he acquired his.

"Q. Soon after, long after, or what?

"A. No, I'd say it was afterwards.

"Q. Beg your pardon?

"A. I'd say shortly afterwards.

"Q. All right. What did he tell you?

"A. It would just make a nice location out here.

"Q What would make?

"A. This property.

"Q. When you say 'this property,' what do you mean?

"A. The property, the location of the property.

"Q. Well, could you tell me what the property is you are talking about?

[fol. 324] "A. The property on 7th Street.

"Q. Can you describe it a little more in detail? 7th Street is a long road.

"A. Well, it is a property that adjoins the Thruway."

Page 107, Line 9, to Page 128, Line 11:

"Q. How far is it from Allentown?

"A. Oh, I have never clocked it off, but it is not far. It is about a five or six minutes' ride from here, I'd say.

"Q. And how far is it from the Two Guys from Harrison?

"A. I have never clocked that off, but I imagine it is another five or six minutes.

"Q. By automobile?

"A. Yes.

"Q. Now then, you first heard about this property when your father-in-law, Mr. Douglas, mentioned it to you shortly after he had built his—

"A. (Interposing) He had acquired.

"Q. —his Portland Cement office, right?

"A. Yes.

"Q. All right. Then what did you do when he told you about it?

[fol. 325] "A. We became interested and looked at it.

"Q. All right. What did you do after you looked at it?

"A. What did we do after we looked at it?

"Q. Yes. What did you do after you looked at it?

"A. Looked at it some more.

"Q. All right. Then what did you do? When you say 'we looked at it,' whom do you mean?

"A. People from the store.

"Q. Who? Give me their names.

"A. Well, I don't know who. I mean, at that time we had —I don't remember who.

"Q. Did you look at it?

"A. Oh, sure.

"Q. And can't you tell me one other person?

"A. Well, I am sure Mr. Greaser looked at it.

"Q. Yes.

"A. And it looked like a nice piece of property.

"Q. How big a piece of property was it?

"A. You mean the length of it?

"Q. Length, the breadth, the acreage—any way you want [fol. 326] to tell me how big it was.

"A. It was about 200 acres.

"Q. Was there anything on it?

"A. Yes.

"Q. What?

"A. The ball field.

"Q. Is that Braeden Field?

"A. Yes.

"Q. Anything else?

"A. Farm house.

"Q. What else?

"A. That's about it.

"Q. Who owned it?

"A. A part of it was owned by McGinley, and—

"Q. What?

"A. And I don't know the others. I don't remember the names of the other two people. And the Newhart estate.

"Q. Now, are you sure McGinley owned it when you first had it called to your attention by Douglas?

"A. That I don't know.

"Q. Who owned it when it was first called to your attention by Douglas?

"A. This I don't remember.

[fol. 327] "Q. All right. You looked and you looked a second time.

"A. We had been looking at lots of places. We had Mr. Rinesmith, the real estate man, call it to our attention.

"Q. When did he call it to your attention?

"A. I don't know the date.

"Q. It was after your father-in-law had called it to your attention?

"A. I am sure it is.

"Q. Now, what are some of these other properties you looked at?

"A. Oh, there is quite a few of them.

"Q. Along 7th Street?

"A. No. Yes, I think there were some on further. And we looked at a lot of properties.

"Q. Did you ever talk to a man named Noblock about this?

"A. I don't know him.

"Q. About this Braeden Field tract?

"A. I don't think I'd know him.

"Q. The answer is, you didn't?

"A. I don't think I know him.

"Q. Then you didn't talk to him?

[fol. 328] "A. Well, I don't know. I don't think I know this man.

"Mr. Walker: He doesn't think he knows him.

"Q. All right.

"A. I could know him. I don't know.

"Q. Well, what did you do after this realtor spoke to you about it, still keeping your attention focused on the Braeden property. What did you do?

"A. We kept looking at real estate.

"Q. Go ahead. You kept looking. At some point, you stopped looking and did something else, or at least, you did something else in addition to looking. Now, when was that?

"A. Oh, you mean you want to know when we bought the property?

"Q. Well, something may have intervened between the time you looked and the time you bought. What was that?

"Mr. Walker: He didn't say anything intervened.

"Mr. Kohn: I am asking him if he did.

"Mr. Walker: Between the time he looked and the time he bought—whether anything intervened?

"Mr. Kohn: Yes.

"Mr. Walker: You mean with relation to the property?

[fol. 329] "Mr. Kohn: Yes.

"A. I don't know.

"Q. You don't know?

"A. No.

"Mr. Walker: Ask him, if you feel something intervened.

"Mr. Kohn: Well, I know something intervened. I want to see whether he tells me.

"Mr. Walker: Well, ask him a question.

"Q. You don't know?

"A. I don't know.

"Q. When did you decide to buy it?

"A. The date?

"Q. Yes.

"A. I don't remember.

"Q. With whom did you discuss the terms of purchase?

"A. With whom did I discuss the terms—with McGinley.

"Q. Where? At his office?

"A. No, I don't think so.

"Q. At your office?

"A. I think it was at Rappaport's office, or home.

[fol. 330] "Q. Who is Rappaport?

"A. He is another lawyer.

"Q. And how did he get into thi. situation?

"A. We used him also.

"Q. Did he represent you in the purchase?

"A. No, he was helpful in the purchase. He didn't—

"Q. (Interposing) What do you mean by helpful?

"A. I mean he helped formulate it.

"Q. Well, would you tell me what his part was?

"A. Well, we wanted the whole tract of land and he represented the Newharts.

"Q. Yes.

"A. And we weren't interested in the thing unless we could get the whole thing together; so he was the one that got the whole thing together.

"Q. All right. So that the first time you discussed with any representative of the sellers the terms of purchase was the conversation at Rappaport's home?

"A. I think so.

"Q. And who was there? Was McGinley?

"A. It could be. I don't remember exactly.

[fol. 331] "Q. How much was this purchase?

"A. In dollars and cents?

"Q. Yes.

"Mr. Walker: What? All of them, or the Breaden tract?

"Mr. Kohn: The Breaden first.

"A. We'd have to get the figures.

"Q. Don't you know?

"A. Yes, I know.

"Q. Then tell me.

"A. I'd like to be sure.

"Q. Tell me approximately.

"A. I think—well, I'd like to get the figures for you.

"Mr. Walker: I will interpose an objection there. I think there are deeds on record which speak for themselves and are the best evidence.

"Q. You are presumably a man of some affluence, Mr. Hess, but I take it you don't go around buying $200,000 properties every week, do you?

"Mr. Walker: I object to that. That is immaterial.

"Q. You mean to say you can't remember a property you bought just six or seven months ago, how much you [fol. 332] paid for it?

"A. I said I wanted to be sure.

"Q. Did you pay $100,000?

"A. We paid more than $100,000.

"Q. Did you pay $200,000?

"A. I want to give you the right figure.

"Q. Would you ask your attorney to give you the figures?

"Mr. Walker: The figure on the Breaden Field tract was $200,000.

"Q. And how much did you pay for all of it?

"Mr. Walker: I think the rest is immaterial. I am going to object to testimony on that.

"Mr. Kohn: I think it tests this man's credibility. You can't tell me somebody would buy a $200,000 property, involving a hundred or more acres, obviously a major acquisition which he has considered for a period of some years, and he hasn't any better idea of what he paid for it than what he purports to give us. And I think his credibility is a very important aspect of this thing, and I am entitled to get his recollection.

"Mr. Walker: That is the very reason why he didn't answer. He said he wanted to be certain, and he couldn't [fol. 333] be certain, but he said it was much more than $100,000. I have given the $200,000. As to the Newhart properties, the deeds are on record. They have nothing whatsoever to do with this proceeding.

"Mr. Kohn: We think they do, because McGinley participated and got a profit out of the Newhart sale, as you know very well, because you said so.

"Mr. Walker: He got the Pennsylvania realty tax out of that. He can't testify from his own personal knowledge, if he has none, as to the precise figure. I can give you the exact figures for the sale of these other properties, but I don't think you are entitled to them. If Judge Lord directs me to, fine, but you can get them off the records at the Recorder of Deeds' office.

"By Mr. Kohn:

"Q. All right. What is the name of the estate that you bought this other property from?

"A. I believe it is the Newhart estate.

"Q. Now, why did you need McGinley in that deal?

"A. I didn't need McGinley. We wouldn't buy the property unless we had the whole thing tied up.

"Q. But why did McGinley get some money?

[fol. 334] "A. I never knew he did get any out of it.

"Q. Until now?

"A. Until I hear you say this.

"Q. Now, how many times did you discuss the purchase of the Braeden tract with McGinley?

"A. I don't know.

"Q. More than once?

"A. It could be.

"Q. Did you ever discuss it in anybody's office in daylight?

"A. I don't remember.

"Q. How many times did you discuss the purchase of the other tract with McGinley—the Newhart tract?

"A. Well, it was understood that the whole thing had to be—

"Q. (interposing) How many times did you discuss it with McGinley?

"A. I really don't know.

"Q. Did you ever discuss it with him?

"A. Oh, yes. Definitely.

"Q. In private homes in the evening?

"A. I don't know.

"Q. Did McGinley ever come to your home?

"A. I don't think so.

[fol. 335] "Q. Did he ever come to Mr. Greaser's home?

"A. This I don't know.

"Q. When you were there?

"A. I don't think so.

"Q. To Mr. Walker's home?

"A. I don't know.

"Q. When you were there?

"A. I don't know; when I was there?

"Q. Yes.

"A. Not that I know.

"Q. So that the only meeting you ever recall having with McGinley with regard to either the Braeden or the Newhart tract was the one meeting at Mr. Rappaport's home?

"A. No, we must have had more.

"Q. Tell me about the others.

"A. I don't remember.

"Q. Do you remember where they were?

"A. No.

"Q. When they were?

"A. No, I don't remember the dates.

"Q. Do you remember whether they were in daytime or nighttime?

"A. I don't know.

[fol. 336] "Q. You don't know. Do you remember what day of the week it was that you signed the agreement?

"A. The day of the week? I don't know what day of the week.

"Q. Do you know whether any of these transactions occurred on Sunday?

"A. No, sir, they didn't.

"Q. You are positive?

"Mr. Walker: I object to that, anyway. Judge Lord already ruled that was facetious and immaterial. He said he didn't remember, so I am directing him not to answer.

"Mr. Kohn: Judge Lord said that that, in his opinion, would not be a material factor.

"Mr. Walker: Hardly.

"Mr. Kohn: But that doesn't mean that it is not proper discovery.

"Mr. Walker: The witness already testified he did not remember what date or day of the week.

"Mr. Kohn: The witness testified it was not Sunday.

"Mr. Walker: He didn't think it was Sunday, as I recall, but he didn't know.

"By Mr. Kohn:

[fol. 337] "Q. All right. Could you tell me why none of these negotiations took place in anybody's office?

"A. I don't know. They could have.

"Q. Did they?

"A. I don't think so.

"Q. What do you mean, when you say 'could have'? Do you mean that it did, that there was a possibility it might have, or that there would have been nothing to prevent it having taken place? What do you mean when you use this phrase?

"Mr. Walker: In what respect? In relation to what question?

"Mr. Kohn: It seems to be his favorite answer to all questions, 'It could have,' which I take it he thinks gives him carte blanche to answer any way he wants.

"Mr. Walker: No, if his present recollection isn't clear, he is not going to say it is or it isn't. I think you know very well what it means. I object to that question.

"Mr. Kohn: I know what it means. It means he knows but doesn't want to answer. He wants to leave himself free to say anything at some other time.

"Mr. Walker: I object to that inference.

[fol. 338] "By Mr. Kohn:

"Q. Tell me, who decided to pay $200,000 for a portion of the Breaden tract?

"Mr. Walker: I object to that question, anyway. There is no testimony that he only bought a portion of the Breaden tract.

"Mr. Kohn: Oh, goodness gracious, we all know he only bought—

"Mr. Walker: (Interposing) He got the entire tract. The only thing he didn't buy was a little corner occupied by Nationwide Insurance Company. But the ball field intact plus the parking lot was conveyed.

"By Mr. Kohn:

"Q. When McGinley bought the Breaden Field, he paid $180,000 for it, didn't he?

"A. I don't know.

"Q. You don't know what he paid for it?

"A. No.

"Q. You didn't know what he paid for it when you bought it? How long after he bought it did you buy it?

"A. I don't know. I don't know when he bought it.

"Q. All right. I guess that is as good an answer as any. So you don't know what McGinley paid for it, you don't [fol. 339] know when he bought it. Did you decide to pay $200,000 for it?

"A. (Addressing counsel) You just said we are not going to answer that.

"Mr. Walker: (Addressing the witness) No, you can answer that, if you know.

"Q. Did you decide to pay $200,000 for it?

"A. Yes.

"Q. Now, who participated in that decision with you?

"A. The group here at the store.

"Q. Who were they?

"A. Mr. Greaser.

"Q. Who else?

"A. Mr. Hertz.

"Q. Hertz?

"A. Yes.

"Q. And who else?

"A. That's it.

"Q. What is Hertz' job?

"A. Controller.

"Q. Could you tell us what was the nature of the discussion which culminated in the decision to offer $200,000? [fol. 340] "A. I don't remember the exact words.

"Q. Did anybody mention what McGinley had paid for it?

"A. I don't remember.

"Q. Did anybody mention who owned it? Who owned the tract?

"A. They could have. I don't know.

"Q. Did anybody mention the fact that McGinley was a part owner of it?

"A. We were buying the property from Mr. McGinley. We all knew who—

"Q. (Interposing) Did the fact that it was McGinley who was selling it have anything to do with the price that was paid?

"A. No.

"Q. Did anybody mention what McGinley had done in connection with the Blue Laws?

"A. No.

"Q. What?

"A. Not that I know of.

"Q. You are sure of that?

"A. I am sure.

"Q. Did anybody mention the fact that the property was less than McGinley and his group had bought from the ball [fol. 341] park owners just a year before?

"A. This wasn't discussed.

"Q. Didn't you know that some of the 7th Street frontage was not being conveyed to you?

"A. This wasn't discussed.

"Q. You did not discuss the fact when you decided to pay $200,000 that part of the 7th Street frontage was being retained by the owners of the Braeden tract?

"A. Oh, you are talking about that little insurance thing, this insurance building.

"Q. Yes.

"A. Yes, we know that.

"Q. Did anybody mention that fact?

"A. We knew it.

"Mr. Walker: He said 'We knew that.'

"Q. Did anybody mention it?

"A. Oh, sure, we knew it.

"Q. Did anybody mention it at this meeting?

"A. We knew it.

"Q. Did anybody mention it at this meeting of the three people?

"Mr. Walker: He already answered. He said they knew it.

[fol. 342] "Q. Well, will you say that either they did or didn't mention, so I can ask you another question?

"A. Well, we all knew it.

"Q. Did anybody refer to the fact that during the meeting of you and your two associates here, at which you decided to pay $200,000, that you were not going to get title to a part of the Braeden tract along 7th Street?

"A. We all knew it.

"Q. Mr. Hess, if we stay here until tomorrow morning at seven o'clock, you are going to answer that question.

"Mr. Walker: He has already answered the question.

"Q. The question is, did anybody mention that fact. The answer is yes or no. And don't keep telling me that you all knew it.

"A. We all knew it.

"Q. Well, did you mention it? Did anybody refer to that fact during this meeting?

"A. We all knew it.

"Q. You can't answer it yes or no?

"A. We all knew it.

"Q. All right.

"Mr. Kohn: Well, I think at this point, in view of the [fol. 343] witness' obvious refusal to answer a clear question which calls for a yes or no answer, I am going to

suspend these depositions, and I am going to ask this young lady to be at Judge Lord's chambers as soon as he can see us tomorrow morning, and I am going to ask for a direction to answer that question.

"Now, we will take a five-minute recess, and if you wish to talk to your client and suggest that he answer it so we can get on and complete this thing, I am agreeable. If not, and we have to play rough and annoy the court by this man's obstinacy, we will just have to do it.

"Mr. Walker: Don't make any threats here, please. I don't like this playing-rough business.

"Mr. Kohn: I have never seen any more stupid exhibition by somebody who is presumably a businessman of some intelligence.

"Mr. Walker: Save your comments for yourself, but don't threaten me with this playing-rough business, or make any accusations in my presence to my client. I don't like that, and I think it is totally uncalled for.

"And furthermore, I think it is as bad as that lie in that petition of yours, which I resented very much, where you claim for a week after you wrote him a letter he ducked [fol. 344] service, and the next morning I called you. And I didn't like that.

"Mr. Kohn: Yes, after I indicated precisely what I had to indicate now—that if he didn't do what ordinary businessmen do without compulsion, we would have to proceed with the court's process and compel him to do it.

"Mr. Walker: I am anxious to get this thing over with, but I don't like to have my clients criticized and slandered in my presence. I won't tolerate that.

"Mr. Kohn: You are a lawyer of some experience. You know he is a man of more than routine intelligence. And if I ask him if something was mentioned during a conversation and he cutely repeats 'We all knew it,' and I ask the question four or five times and he persists in that answer, he is not cooperating in answering the questions as a witness should.

"Mr. Walker: My client is a very busy man. He can't keep all these things in his head.

"Mr. Kohn: Then he should say 'I don't know' or 'Yes' or 'No' or 'I can't remember,' but not to persist and say 'We all knew it.'

"Mr. Walker: I want to let you know that I don't want any more of these innuendoes. I don't like it and will not [fol. 345] tolerate it.

"Mr. Kohn: I will adjourn for five minutes.

"Mr. Walker: You don't have to adjourn. What is the question?

"Mr. Kohn: I am asking for a five-minute recess. The stenographer will read you the question as it was asked five times. You can talk to the witness about it.

"Mr. Walker: I don't need to talk to my witness about it. I am not going to coach him. I never have and never will, and you can remain here and either ask that question or additional questions.

"Mr. Kohn: I am going to repeat that same question. You can do what you want when we return at the end of five minutes.

"(A short recess was taken.)

"Mr. Kohn: (Addressing the reporter) Would you please read to the witness the last question, which I think was in the same form in several repetitions:

(The previous question was read, as follows:

"'Q. Did anybody refer to the fact during the meeting of you and your two associates here, at which you decided to pay $200,000, that you were not going to get title to a part of the Breaden tract along 7th Street?')

[fol. 346] "A. Well, I don't recollect, because we all knew it. And Mr. Walker reminds me, to refresh my memory, that that meeting was on Sunday night at our house.

"Q. At whose house?

"A. At my house. The meeting with McGinley.

"Q. Did he refresh your recollection as to any other meetings with McGinley?

"A. No, this meeting, and Mr. Greaser was there, and Attorney Boyle.

"Q. That is Orrin Boyle?

"A. Orrin Boyle.

"Q. Mr. Walker was not there?

"A. Yes, he was there too.

"Q. Oh, he was there too?

"A. Yes.

"Q. And that is the agreement, or the meeting at which you signed the agreement of sale?

"A. Yes.")

OFFERS IN EVIDENCE

Mr. Kohn: We should like to offer at this time all of the exhibits, Plaintiff's Exhibit 1 to Plaintiff's Exhibit 34, inclusive.

Judge Hastie: Before you go to the exhibits, is there [fol. 347] any objection to the deposition?

Mr. Rubin: No, sir.

Judge Hastie: There being none, it will be admitted.

Mr. Kohn: Exhibits, Plaintiff's 1 to 34, I take it it will not be necessary for me to refer to each of them seriatim now.

Judge Hastie: They will be admitted.

(Clipping from Page 17 of Evening Chronicle of December 3 was marked Plaintiff's Exhibit 17 for identification.)

(Clipping from Page 1 of the Evening Chronicle of December 5 was marked Plaintiff's Exhibit 18 for identification.)

(Plaintiff's Exhibits 1 to 34, inclusive, were received in evidence.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Kohn: I take it also, sir, that we have the right to refer in our brief or oral argument, and thereby call the attention of the Court to any Pennsylvania statute.

Judge Hastie: Of course, or any legislative history of the statutes.

Mr. Kohn: Finally, the only thing we reserve the right to put into the record is whatever documents we deem appropriate from the documents marked during Mr. Hess' [fol. 347a] deposition, which have not yet been furnished to us, which we understand we can clarify by, I suppose it is, two weeks from today, he indicated.

Judge Hastie: Very well. For that limited purpose the record will remain open.

Mr. Kohn: May we have some time, sir, to file a brief and present oral argument?

Judge Hastie: I should assume that both sides would prefer to file briefs and make argument after the briefs have been filed rather than argue now.

Mr. Kohn: I think that would be better.

Judge Hastie: There is one thing about that. Obviously, though we can read the record, the more time elapses the less fresh our recollection of the record would be. So within how short a time could you get your briefs in?

Mr. Kohn: May I ask the court reporter when we can have the record, because I would like very much to point to appropriate parts of the record.

Judge Hastie: Yes.

Mr. Kohn: Could we file our brief, sir, by November 9? That would be about two weeks after we get the record.

Judge Hastie: All right. I was going to suggest the 6th, but the 9th will give you the weekend.

[fol. 348] Mr. Rubin: How about the 27th for the defendant?

Judge Hastie: The 27th of what?

Mr. Kohn: To answer our brief.

Judge Hastie: The 27th of November?

Mr. Rubin: No, I do not need that much time, I am sorry. The 20th.

Judge Hastie: The 20th. That will be agreeable.

Mr. Kohn: Then we can fix a time for oral argument that week or the following week at Your Honors' convenience. I think that would be an appropriate time schedule.

Mr. MacIntosh: May I be heard?

Judge Hastie: Yes.

Mr. MacIntosh: Excuse me, if I may be heard for just one moment, I know everyone is under pressure here, but the effect of these restraining orders, and the situation that has been created, as you know, we now have thirteen cases, and there are more in prospect; the rest are being made in Delaware County now. And we are advised reliably that

a large number of stores expect to open up on November 15, in the light of this situation, to avoid the loss of the Christmas trade, which will begin to come in.

[fol. 349] So that I think we can anticipate a large number of stores who are planning to open on or about November 15 on Sunday as they have never done before, by reason of the situation that has been created here.

Judge Hastie: I wonder if Mr. Rubin could get his brief in by a week after the other one, by the 16th?

Mr. Rubin: Sure, I will be glad to.

Judge Hastie: Then we will try to have argument perhaps the latter part of that week. I am not even sure whether I am sitting in the Court of Appeals that week, but I will have to check on it.

I think, since we cannot be quite sure about commitments, if we arrange a schedule of briefs then we will check on when it will be possible for the three of us to sit, and attempt to make it either the end of the week of the 15th or the very beginning of the week of the 22nd, but we will make it as quickly as we can in the light of the situation that Mr. MacIntosh suggests.

Judge Lord: When will you file your brief, Mr. MacIntosh?

Mr. MacIntosh: Well, we would like to see Mr. Kohn's brief, and we will file a week after that.

Judge Hastie: I suggest that the several friends of the Court should have their briefs in also not later than the [fol. 350] 16th of November.

Mr. MacIntosh: The friends of the Court are on two sides. So that those who are in support of Mr. Kohn's position I suppose should be in by the 9th and ours should be in by the 16th, if that is agreeable to the Court.

Judge Hastie: Which friends of Court are supporting the position of the plaintiff? Are there any in court?

Mr. Kohn: I understand the Civil Liberties Union may want to file some very brief memorandum. I think they did file a brief which actually is on record in these proceedings when the case was before the Court of Appeals.

Judge Hastie: I do not think we have a motion.

Mr. Kohn: No, not at the moment, but I think they may. I think Mr. Watts who appeared is out of New York now on a case somewhere in the South.

Mr. MacIntosh: I suppose their position has really been fully stated in the case that is already before the Court in which briefs have been filed.

Mr. Kohn: I would simply do this, I would simply inform them of whatever the Court's direction is, and if they choose to file appropriate motions for leave to file a brief as amicus curiae I assume it would have to be within the time set.

[fol. 351] Judge Hastie: The friends of Court who are in my mind are all taking the same position that you take, Mr. MacIntosh. So as to them the ruling of the Court will be that their briefs should be in not later than the 16th. The brief of the plaintiff to be in by November 9 and all other briefs by the 16th, with the Court fixing a date for argument soon thereafter.

Mr. Rubin: As I understand our conversation yesterday, Your Honor, I have until next Tuesday to let the Court know if there are any mistakes or inaccuracies in the material submitted by Mr. Kohn on the material from briefs and so forth.

Judge Hastie: Let us extend that to the end of next week since we are taking a little time for briefs.

Mr. Rubin: It is satisfactory if I do that by letter to the Court with copy to Mr. Kohn?

Judge Hastie: Oh, yes, that can be done by letter.

If we hear nothing from you we will assume that you have found nothing to object to.

Is there anything else to be heard today?

Mr. Kohn: No, sir.

Mr. Rubin: No, sir.

[fol. 352] Judge Hastie: Then we will adjourn court.

[fol. 357]

EXHIBIT P-9

STIPULATION BY DEFENDANT DISTRICT ATTORNEY

[fol. 358]

IN THE COURT OF QUARTER SESSIONS OF LEHIGH COUNTY

COMMONWEALTH OF PENNSYLVANIA

STIPULATION AND AGREED STATEMENT OF FACTS.

(In both Appeals.)

Now, May 14, 1958, it is hereby stipulated and agreed by and between Paul A. McGinley, Esquire, District Attorney of Lehigh County, Pennsylvania, and Morris Efron, Esquire and George J. Joseph, Esquire, counsel for the defendants in the above captioned appeals from summary convictions, that the Agreed Statement of Facts marked Exhibit "A", attached hereto shall be a part of the record in these proceedings and all statements therein shall be considered by the Court as facts with like force and effect as if they had been made as findings of fact by the Court after hearing evidence thereon.

It is further stipulated and agreed that said agreed statement of facts shall be a part of the record in the following listed appeals from summary convictions now pending in the above Court, and all statements therein shall be considered by the Court, in said cases, as facts with like force and effect as if they had been made as findings of fact by the Court after hearing evidence thereon, except that whenever the date of arrest of a defendant shall differ from December 8, 1957, the date of arrest shown in Paragraph 4 of the Agreed Statement of Facts shall conform to the actual date of arrest:

Nos. 110 to 119, inclusive, January Sessions, 1958
Nos. 121 to 130, inclusive, January Sessions, 1958
Nos. 134 to 136, inclusive, January Sessions, 1958
Nos. 138 to 153, inclusive, January Sessions, 1958

Nos. 155 to 162, inclusive, January Sessions, 1958
Nos. 164 to 189, inclusive, January Sessions, 1958

[fol. 359] Wherever the word "Act" appears in the Agreed Statement of Facts, it shall mean the Act of April 22, 1794, 3 Sm. L. 177, Sec. 1, as re-enacted in the Act of June 24, 1939, P. L. 872, Sec. 699.4 (18 P. S. 4699.4).

PAUL A. MCGINLEY,
District Attorney of Lehigh County.

MORRIS EFRON,
GEORGE JOSEPH,
Attorneys for Petitioners.

[fol. 360]

EXHIBIT "A".

AGREED STATEMENT OF FACTS.

1. The Two Guys From Harrison is a store, with some departments leased out, engaged in the retail sale, inter alia, of groceries, fruit and produce, meats and other foodstuffs, drugs and patent medicines, cosmetics and other articles generally found in drugstores and patent medicine stores, books and magazines, clothing of all types, including shoes and baby-wear, sporting goods, automotive needs and supplies including tires, baked goods, camera film, cameras, household needs and appliances, including refrigerators, T. V. sets, radios, and electric ranges, music records, electrical needs and appliances, jewelry items, hardware, items of juvenile furniture, and seasonal items such as Christmas toys and trees, holiday wrappings and decorations, and flowers. The store opened October 28, 1957, after a study was made, indicating the existence of Sunday selling activity within the County of Lehigh.

2. The District Attorney of Lehigh County was sworn into office on January 2, 1956. In April, 1957, he was requested to initiate action under the Act against a certain retail store engaging in Sunday business in Lehigh County, but declined to do so. He stated it was a local policing prob-

lem and that any arrests should be made by local police. He further stated his office would handle any appeals from convictions if arrests were made.

3. For upwards of 6 years immediately prior to December 9, 1957, no prosecution was brought under the Act, as [fol. 361] far as can be ascertained, against any person or business entity by any law enforcement officer or district attorney in Lehigh County.

4. Wide publicity in the public press for several days concerning enforcement of the Act was followed by visitation of over 100 business establishments by law enforcement officials on December 8, 1957. On December 9, 1957, Defendant was arrested under the Act, on orders from the District Attorney of Lehigh County, and was charged with engaging in worldly employment on Sunday, December 8, 1957, at a retail store known as the Two Guys From Harrison located in Lehigh County, Pennsylvania. This Defendant was not engaged in the food, drug, or restaurant department. Simultaneously with Defendant's arrest, other individuals employed in the same store were likewise arrested under the Act, on orders from the District Attorney of Lehigh County. Arrests under the same Act were also made at 6 other retail establishments. These latter 6 establishments discontinued selling on Sunday, but one has remained open as a showroom.

5. From December 8, 1957, to the date of this agreed statement of facts, members of the detective staff of the office of the District Attorney of Lehigh County have visited the Two Guys From Harrison store, every Sunday, and have made arrests each Sunday, under the Act, of individuals employed there. No other arrests have been made.

6. On Sunday, December 8, 1957, counsel for Defendant caused visits to be made by shoppers at 41 retail stores which were open for business that day in Lehigh County, and purchases were made at each store of items other than food and drugs, and similar to items sold at the store of [fol. 362] Two Guys From Harrison. A list of these places and the items purchased (attached hereto as Exhibit No. 1

and incorporated herein by reference) was forwarded to the District Attorney on December 12, 1957, together with a letter from counsel for the Defendant (attached hereto as Exhibit No. 2 and incorporated herein by reference), and was received by the District Attorney. However, the District Attorney declined to initiate any action under the Act against any of the businesses or persons involved. In reply to the letter sent by counsel for Defendant, the District Attorney sent counsel for Defendant a letter dated December 12, 1957 (attached hereto as Exhibit No. 3 and incorporated herein by reference).

7. On Sunday, December 15, 1957, counsel for Defendant caused visits to be made by shoppers at 78 retail stores which were open for business that day in Lehigh County, and purchases were made at each store of items other than food and drugs, and similar to items sold at the store of Two Guys From Harrison. A list of these places and the items purchased (attached hereto as Exhibit No. 4 and incorporated herein by reference) was forwarded to the District Attorney on December 17, 1957, together with a letter from counsel for the Defendant (attached hereto as Exhibit No. 5 and incorporated herein by reference), and was received by the District Attorney. However, the District Attorney declined to initiate any action under the Act against any of the businesses or persons involved.

8. On Sunday, December 22, 1957, counsel for Defendant caused visits to be made by shoppers at 80 retail stores which were open for business that day in Lehigh County, [fol. 363] and purchases were made at each store of items other than food and drugs, and similar to items sold at the store of Two Guys From Harrison. A list of these places and the items purchased (attached hereto as Exhibit No. 6 and incorporated herein by reference) was forwarded to the District Attorney on December 27, 1957, together with a letter from counsel for the Defendant (attached hereto as Exhibit No. 7 and incorporated herein by reference), and was received by the District Attorney. However, the District Attorney declined to initiate any action under the Act against any of the businesses or persons involved.

9. On Sunday, December 29, 1957, counsel for Defendant caused visits to be made by shoppers at 52 retail stores which were open for business that day in Lehigh County, and purchases were made at each store of items other than food and drugs, and similar to items sold at the store of Two Guys From Harrison. A list of these places and the items purchased (attached hereto as Exhibit No. 8 and incorporated herein by reference) was forwarded to the District Attorney on January 3, 1958, together with a letter from counsel for the Defendant (attached hereto as Exhibit No. 9 and incorporated herein by reference), and was received by the District Attorney. However, the District Attorney declined to initiate any action under the Act against any of the businesses or persons involved.

10. On December 14, 1957, Two Guys From Harrison sent a telegram to the District Attorney, and said telegram was received by the District Attorney (attached hereto as Exhibit No. 10 and incorporated herein by reference). On January 4, 1958, counsel for Defendant mailed a letter to [fol. 364] the District Attorney (attached hereto as Exhibit No. 11 and incorporated herein by reference), and said letter was received by the District Attorney. In reply to the letter sent by counsel for Defendant, the District Attorney sent counsel for Defendant a letter (attached hereto as Exhibit No. 12 and incorporated herein by reference).

11. On December 16, 1957, the District Attorney conferred in Harrisburg, Pennsylvania, with the Attorney General of Pennsylvania for the purpose of taking additional action against the Two Guys From Harrison. Counsel for Defendant sent a telegram to the Attorney General (attached hereto as Exhibit No. 13 and incorporated herein by reference), and the telegram was received while the conference between the Attorney General and the District Attorney was in progress.

12. On Sunday, December 8, 1957, the District Attorney's staff and certain police officers of the City of Allentown visited four public bowling alleys in Lehigh County, all of which were engaging in business that day, and took names of proprietors and employees, announcing that they

would be prosecuted for engaging in Sunday operation. Two days later the District Attorney and the Mayor of the City of Allentown jointly announced that they would not prosecute bowling alley proprietors or employees, and that there would thereafter be no objection to Sunday business and employment on their part, since such activities were in their view, recreational. In consequence thereof, no prosecutions have been brought against any bowling alley proprietor or employee although many bowling alleys, both public and in private clubs, are engaging in business every Sunday in Lehigh County.

[fol. 365] 13. On December , 1957, the District Attorney announced that he would not initiate prosecution against anyone for selling Christmas trees on Sunday, December , 1957. On March , 1958, the District Attorney and the Mayor of Allentown announced that they had no objection to Sunday sales by greenhouses or others handling plants, shrubbery, trees, perishable flowers and related items and that they would not initiate prosecution against any business or person for such activity. They did not purport to give immunity from prosecution if other law enforcement agencies brought prosecutions.

14. Sunday, March 2, 1958, a business promotion labeled as a "Home Show" was conducted within an exposition building at the Fair Grounds in Allentown, Lehigh County, Pennsylvania. Sixty business firms rented space within the building and participated in the promotion by displaying their products, quoting prices thereon to the public, giving sales talks, handing out literature and sales brochures, and otherwise promoting the sale of their products, which included home building and improvement materials, home decorating materials, electrical appliances, mechanical appliances and equipment, gas appliances, life insurance, furniture, and household appliances, and related items. Approximately 3:00 P. M. on Sunday, March 2, 1958, counsel for the Defendant sent a telegram (attached hereto as Exhibit No. 14 and incorporated herein by reference) to the First Assistant District Attorney (the District Attorney being out of town and unavailable) calling attention to this activity. No prosecutions were brought by the District At-

torney. No sales were made and this operation took place only on Sunday, March 2, 1958.

[fol. 366] 15. Cement mills operate on Sundays in Lehigh County, and have operated on Sundays for many years, but no prosecutions have ever been brought against the operators of said mills or their employees. This same situation obtains with reference to Mack Mfg. Corp.—a corporation located in Lehigh County, and engaged in the manufacture of trucks and related equipment—and Bethlehem Steel Corp., located in the adjoining County of Northampton.

16. The Sunday Call-Chronical (a Sunday newspaper of general circulation which has its plant and offices in Lehigh County and has a circulation of approximately 90,000) and five radio stations, to wit: Stations WSAN, WKAP, WHOL, WABB and WFME, (all of which radio stations have their broadcasting studios and offices in Lehigh County), operate every Sunday, and have been so operating for years. The Sunday Call-Chronical is written, edited, printed, distributed, circulated, sold and delivered on Sunday. In addition to reporting news, the newspaper carries advertising matter. In addition to reporting news, the radio stations broadcast commercial advertisements every Sunday. No prosecution has ever been brought against the publishers of the newspaper or the operators of said radio stations, any of their employees, or any of the persons or firms whose businesses and products are advertised in said newspaper or on said radio stations on Sundays, as far as can be ascertained.

17. Public amusement parks, public and private golf courses and golf driving ranges, and public and private swimming pools, all operated for profit, have been open on Sundays during the summer season for many years, catering to thousands of people every Sunday, but no prosecution has ever been brought against any of the proprietors or employees thereof, as far as can be ascertained.

[fol. 367] EXHIBIT No. 1

December 12, 1957

Paul McGinley, Esq.
c/o District Attorney's Office
445 Hamilton Street
Allentown, Pennsylvania

Dear Mr. McGinley:

I am enclosing herewith a list of stores in Lehigh County, which were opened on Sunday, December 8, 1957, the same date on which you visited the business establishment of Two Guys From Harrison-Allentown, Inc., for the purpose of obtaining evidence of violations of the Blue Laws.

You will note that following the name of each store is the item or items purchased on this same Sunday. I do not believe that these articles, by any interpretation of the law, can be considered as necessities.

My purpose in submitting this list is not to cause prosecutions to issue against the merchants whose names I have supplied but, rather, to obtain from you some explanation for the discrimination which is so obviously being practiced.

For your further information, it is the plan of my clients to cause the county to be shopped this coming Sunday and there will be submitted to you the names of business establishments selling items not included on your list of necessities. You must then decide, as a law enforcement agent of this County, whom you must prosecute keeping in mind, as I know you will, that there can be no bias in applying the law.

It is not enough, in my opinion, for you to say that warrants must be sworn out against the parties involved [fol. 368] in making the sales by the shoppers on their own and that it is not your duty to see that it is done. Your very actions this past Sunday indicates that you feel it to be your duty to cause the warrants to be issued—why else would you personally, with your entire staff, call at the store of Two Guys From Harrison-Allentown, Inc., and examine the employees in order to obtain information upon

which you and your staff caused warrants to be sworn out. What is necessary in one case certainly is equally necessary in another.

Very truly yours,

MORRIS EFRON

ME:amt

Enclosure

[fol. 369] EXHIBIT No. 2

Name and Address of Store	*Items Purchased*
Tropical Market Union Boulevard Allentown, Pennsylvania	Sponge
Sterner Bros. 522 North 19th Street Allentown, Pennsylvania	Erace
Campus Shop 23rd and Liberty Streets Allentown, Pennsylvania	Lamp
Lehigh Super Market 1234 Lehigh Street Allentown, Pennsylvania	Comb
Mayer's Super Market Alton Park Allentown, Pennsylvania	Record
Russell Stover Candies Union Boulevard Allentown, Pennsylvania	Christmas ornament
Eddie's 6th St. Market 6th and Tilghman Streets Allentown, Pennsylvania	Shoe polish
Geiger's Market 12th and Tilghman Streets Allentown, Pennsylvania	Toys

Name and Address of Store	*Items Purchased*
John and Alice Market 1011 Market Street Allentown, Pennsylvania	Wax
Kern's 2103 Liberty Street Allentown, Pennsylvania	Polish
[fol: 370]	
Ecko Market 30th and Tilghman Streets Allentown, Pennsylvania	Polish
Guignet's Groceries 1928 Walnut Street Allentown, Pennsylvania	Clothes pins
Landenslager's Groceries 209 South Franklin Street Allentown, Pennsylvania	Polish
Meyer's Market 3023 Lehigh Street Allentown, Pennsylvania	Polish
Rexall Drugs 753 St. John Street Allentown, Pennsylvania	Polish
Schmidt's Highway Market South Fifth Street Allentown, Pennsylvania	Polish
Weidner's Store Fountain & Chew Streets Allentown, Pennsylvania	Wax
Smith's Fifth St. near Turner Allentown, Pennsylvania	Santa lamp
Texaco Station Seventh Street Allentown, Pennsylvania	Auto polish

Name and Address of Store	*Items Purchased*
Luncheonette 9th and Chew Streets Allentown, Pennsylvania	Toy
Zimmerman's Seventh Street Allentown, Pennsylvania	Wax
[fol. 371]	
Delicatessen 9th and Chew Streets Allentown, Pennsylvania	Wax
B & S Smoke Shop 957 Hamilton Street Allentown, Pennsylvania	Mennen Skin Bracer and Scotch tape
Leh and Merkle 12th and Hamilton Streets Allentown, Pennsylvania	Perfume and Scotch tape
Woodys 240 East Hamilton Street Allentown, Pennsylvania	Wax
Tony Kraipovich Atlantic Station Cedar Crest Boulevard Allentown, Pennsylvania	Auto polish
Deiley's Market 30th and Cedar Crest Boulevard Allentown, Pennsylvania	Ribbons and candles
Gould's Drug Store Fourth and Chestnut Streets Emmaus, Pennsylvania	Candles and cards
Rexall Drug Store North 4th Street Emmaus, Pennsylvania	Bubble Bath
Doney's Food Market 34 North 4th Street Emmaus, Pennsylvania	Tide

Name and Address of Store	*Items Purchased*
Gabby's Food Market 500 Broad Street Emmaus, Pennsylvania	Socks and furniture polish
[fol. 372]	
Doney's News Service 601 Chestnut Street Emmaus, Pennsylvania	Christmas candle arrangement
Highland Variety Store 1051 North 19th Street Allentown, Pennsylvania	Scotch tape
Shorty Peters Esso Station North Seventh Street Allentown, Pennsylvania	Batteries
Bartiks 2nd and Turner Streets Allentown, Pennsylvania	Comb
Kresge 6th St. near Turner Allentown, Pennsylvania	Comb
Groceries Penn & Union Streets Allentown, Pennsylvania	Wax
Mike's Place Turner near 4th Street Allentown, Pennsylvania	Tree ornament
Economy Store 4th and Turner Streets Allentown, Pennsylvania	Cleaning fluid
Heckenberger's Drugs 601 Front Street Catasauqua, Pennsylvania	Scotch tape
Yost Brothers Fullerton, Pennsylvania	Flashlight batteries

[fol. 373] EXHIBIT No. 3

OFFICE OF THE
DISTRICT ATTORNEY OF LEHIGH COUNTY
445 HAMILTON STREET
ALLENTOWN, PA.

PAUL A. McGINLEY
District Attorney

ERNEST F. RITTER
First Assistant District Attorney

ROBERT LESKO
Assistant District Attorney

MARK GEARHART
Assistant District Attorney

December 12, 1957

Morris Efron, Esquire
502 Hamilton Street
Allentown, Pennsylvania

Dear Mr. Efron:

I received your letter late today concerning the agents from 2 Guys from Harrison-Allentown, Inc. and the list of 41 local establishments which they claim are in violation of the Sunday Blue Laws.

This office called practically all of the Merchants included on your list to determine whether the paid agents from 2 Guys from Harrison had identified themselves, make known the purpose of the visit, and requested compliance by the merchants with the Sunday Sales Laws. In all cases we were [fol. 374] informed that your agents had acted surreptitiously and failed to request a compliance with the Sunday Law.

As you well know, each of the establishments which were visited by us last Sunday was informed of the purpose of

the visit and compliance with the law requested. This was in line with my instructions to the policing authorities.

Last Saturday and Sunday I asked the citizens of this county to assist in the enforcement of this law and I will assume that it was for this reason that your agents made their visits to other establishments and not because of ulterior motives.

We inform you as we have informed all private citizens who have spoken to us of enforcement, that your agents must now go to an alderman within the county and swear out an information against the merchants they desire to arrest. This will save costs for the defendant since your agent in any event would be a necessary witness at the alderman's hearing and would entail additional witness fees if some other individual swore out the information. In all cases started this week, the information was sworn to by the person who saw the violation. We believe that for the purpose of uniformity and fairness we should continue that practice.

Your agents may inform the alderman if he does not have the requisite forms that this office stands prepared to supply him with them.

As far as Sunday, December 15 is concerned, we are happy to know that you again plan to assist in the enforcement of the law by sending out your paid agents again on shopping tours for non-essential items. May I solicit your cooperation in assigning to the store known as 2 Guys from Harrison six agents who can assist us in that store in enforcing the law.

[fol. 375] In all cases where your agents have sworn out the informations and appeals are made, this office will handle on behalf of the Commonwealth the prosecution of the cases in the Court of Quarter Sessions of Lehigh County.

Sincerely yours,

PAUL A. MCGINLEY
District Attorney

pam/vs

[fol. 376] EXHIBIT No. 4

LIST OF PLACES SHOPPED ON SUNDAY, DECEMBER 15, 1957

Name & Address of Establishment	*Item Purchased*
Gernald S. Mest 16th and Chew Streets Allentown, Pennsylvania	Film Magazine
Economy Store 638 North 16th Street Allentown, Pennsylvania	Cigarettes
Kivert's Cut Rate 2246 Liberty Street Allentown, Pennsylvania	Christmas Cards
Deiley's West Gate Market 30th and Gordon Streets Allentown, Pennsylvania	Newspaper
Harry J. Houck Pharmacy 19th and Allen Streets Allentown, Pennsylvania	Christmas Cards
Kern's Market Liberty Street & Albright Avenue Allentown, Pennsylvania	Crepe Paper Roll of Wire
Variety Store 16th and Tilghman Streets Allentown, Pennsylvania	Book
Strauss' Market 1001 North 19th Street Allentown, Pennsylvania	Pick-up Stix Card Film
West End Pharmacy 17th and Union Streets Allentown, Pennsylvania	Box of Christmas Cards Film Paper

[fol. 377]

Name & Address of Establishment	*Item Purchased*
Sterner Bros. 522 North 19th Street Allentown, Pennsylvania	Airplane Model Christmas Cards
Grocery Store 348 South 16th Street Allentown, Pennsylvania	Cards, Crepe Paper, Books, Film, Cigarettes, Newspaper
Reed's Gas Station Second and Bridge Streets Catasauqua, Pennsylvania	Flashlight Batteries
Mooney's Almond and Third Streets Catasauqua, Pennsylvania	Toy Wrapping Ribbon
Ziatyk's Market Egypt Road Egypt, Pennsylvania	Flashlight Batteries
Grocery Store 1101 Fourth Street Catasauqua, Pennsylvania	Polo Shirt
Retzler's Second Street Catasauqua, Pennsylvania	Robin Hood Game
Jodido's Store Second Street Cementon, Pennsylvania	Toy Tiger
Tree Mart Main and East 16th Streets	Christmas Tree
Lee's Gas Station Egypt Road Egypt, Pennsylvania	Car Wax
Brown and White Luncheonette Catasauqua, Pennsylvania	Shoe Polish

[fol. 378]

Name & Address of Establishment	*Item Purchased*
Plaky's Food Center 1798 Broadway Bethlehem, Pennsylvania	Plastic Rocket
Broadway Variety Store Broadway & Mohican Street Bethlehem, Pennsylvania	Santa Clause Candles
George Werley Atlantic Station 13th and Tilghman Streets Allentown, Pennsylvania	Batteries
Leonard's Market Allentown, Pennsylvania	Charles Antel Hair-spray
Bill's Esso Service Union Blvd. & Wahneta Street Allentown, Pennsylvania	Flashlight.
Yallo's Groceries 1200 Broadway Bethlehem, Pennsylvania	Windex Glass Wax
Place of Business at 217 North Main Street Emmaus, Pennsylvania	Aero Snow
Boehm's Groceries 427 North Chestnut Street Emmaus, Pennsylvania	Toy Marbles
Place of Business at 115 Third Street Emmaus, Pennsylvania	Christmas Ornament —Three wise men on camels
Gerald Mest Drug Store 1601 Chew Street Allentown, Pennsylvania	Pen Birthday Card

[fol. 379]

Name & Address of Establishment	*Item Purchased.*
Kemp's Gulf Station 17th and Sumner Avenue Allentown, Pennsylvania	Flashlight Batteries Zerex
Variety Store 16th and Tilghman Streets Allentown, Pennsylvania	Deodorant Newspaper Magazine
Gulf Station 7th and Tilghman Streets Allentown, Pennsylvania	Lighter Fluid Car Wash
Bauer's Grocery Store New and Allen Streets Allentown, Pennsylvania	Pen Doll Card
Gerhart Atlantic Station Seventh and Liberty Streets Allentown, Pennsylvania	Flashlight Batteries
Economy Store 347 North 16th Street Allentown, Pennsylvania	Glass Wax
R. Herman Sunoco Station 11th and Turner Streets Allentown, Pennsylvania	Flashlight Batteries
Stetzler's Grocery 1502 Turner Street Allentown, Pennsylvania	Glass Wax
Hajewski Atlantic Station 12th and Hamilton Streets Allentown, Pennsylvania	Flashlight Batteries
J & P. Groceries 200 Block North 8th Street Allentown, Pennsylvania	Window Wax

[fol. 380]

Name & Address of Establishment	*Item Purchased*
Bernstein Atlantic Station 8th and Chew Streets Allentown, Pennsylvania	Flashlight Batteries
Esso Station 15th and Gordon Streets Allentown, Pennsylvania	Flashlight Batteries
Goodie Shoppe 30 North Tenth Street Allentown, Pennsylvania	Birthday Card Magazine
Dugan's Cities Service 12th and Gordon Streets Allentown, Pennsylvania	Chamois Flashlight Batteries
Reese's Esso Station 13th and Tilghman Streets Allentown, Pennsylvania	Flashlight Batteries
Heiney Mobil 15th and Tilghman Streets Allentown, Pennsylvania	Flashlight Batteries
Dorward's Confectionery 9th and Allen Streets Allentown, Pennsylvania	Refused to sell anything to shopper because she was not known to him. However, in her presence, sold Glass Wax and Birthday cards to 2 other customers
Economy Store 551 Emmaus Avenue Allentown, Pennsylvania	Lighter Fluid Everyready Batteries
Mountain Dell Market 825 Dalton Street Allentown, Pennsylvania	DuPont Sponge

[fol. 381]

Name & Address of Establishment	*Item Purchased*
Seibert's Market Alton Park Allentown, Pennsylvania	Photo Flash Battery
Raymond J. Fenstermaker South Fourth Street Emmaus, Pennsylvania	Car Skin
Tropical Market Union Boulevard Allentown, Pennsylvania	Sponges Deodorant Nails Kleenex
Cookie's Cut Rate Hanover Avenue Allentown, Pennsylvania	Gloves Toy Mousetraps
Gabe's Market Hanover Avenue Allentown, Pennsylvania	Pen
Woody's Hanover Avenue Allentown, Pennsylvania	Toy
Leonard's 2301 Union Blvd. Allentown, Pennsylvania	Hand Lotion Scrub Brush Paper
Mobilgas Gas Station (W. Hamm) 2030 Union Blvd. Allentown, Pennsylvania	Simoniz Car Wax
Howard Johnson's Union Blvd. Allentown, Pennsylvania	Howard Johnson Savings Bank
Walp's Restaurant Union Boulevard Allentown, Pennsylvania	Salt & Pepper Shakers

[fol. 382]

Name & Address of Establishment	*Item Purchased*
Atlantic Gas Station Airport Road Allentown, Pennsylvania	Lube Stick
Boulevard Bowling Alleys Union Boulevard Allentown, Pennsylvania	Shoe Bag
Yohe's Drug Store 1155 North Van Buren Street Allentown, Pennsylvania	Toy Hair Bleach
Airport Concession A-B-E Airport Allentown, Pennsylvania	Toy Knick knack
Atlantic Gas Station (C. R. Weiant) Hanover Avenue Allentown, Pennsylvania	Simoniz Cleaner
Sunoco Gas Station Union Blvd. & Irving Street Allentown, Pennsylvania	Flashlight Batteries
Russell Stover Candies Union Boulevard Allentown, Pennsylvania	Plate Candies
The Old Airport Building Allentown, Pennsylvania	Toy Glue
Town Auto Hanover Avenue Allentown, Pennsylvania	Flashlight Batteries
John H. A. Snyder Gas Station Main Street Emmaus, Pennsylvania	Flashlight Batteries

[fol. 383]

Name & Address of Establishment	*Item Purchased*
Markle's Groceries Main Street Emmaus, Pennsylvania	Cookie Jar
Magazines & Paper Shop 601 Chestnut Street Emmaus, Pennsylvania	Magazine
Gabby's Market 500 Broad Street Emmaus, Pennsylvania	Umbrella Scrub Brush
Rexall Drug Store South Fourth Street Emmaus, Pennsylvania	Doll Mechanical Toy
John Gould Pharmacy Main Street Emmaus, Pennsylvania	Light Bulbs Film
Dorney's Food Market South Fourth Street Emmaus, Pennsylvania	Combs Ball point pen Men's socks
Roadside 1152 Union Boulevard Allentown, Pennsylvania	Toy Elastic Paper
Fry's Atlantic Gas Station Main Street Emmaus, Pennsylvania	Flashlight White Tire Paint

[fol. 384] EXHIBIT No. 5

December 17, 1957

Paul A. McGinley, Esq.
District Attorney of Lehigh County
445 Hamilton Street
Allentown, Pennsylvania

Dear Mr. McGinley:

I am enclosing a list of stores and business establishments in Lehigh County which were open on Sunday, December 15, 1957, the same day on which you and your staff visited the business establishment of Two Guys From Harrison-Allentown, Inc., for the purpose of obtaining evidence of violations of the Blue Laws.

You will note, following the name of each store, the item or items purchased last Sunday. These articles cannot possibly be considered as necessities.

The purpose in submitting this information is not to cause prosecutions to be brought against the merchants and establishments involved, but, rather, to obtain from you some explanation for the discrimination which is so obviously and flagrantly being practiced against my client. On December 12, 1957, Attorney Morris Efron, with whom I am associated in this matter, sent you a similar list pertaining to establishments which were selling non-essential items on Sunday, December 8, 1957, and asked for an explanation as to why you had brought a multiplicity of prosecutions against our client and employees, while at the same time closing your eyes to the same acts in these other establishments. No explanation has been given by you, and I might point out that there is considerable talk on the part of the public with respect to the obvious discrimination which has been practiced against our client.

[fol. 385] To be fair and consistent in the position which you say you are taking with reference to the Blue Laws, and if your position is correctly taken under the law, you would necessarily have to proceed against these establishments with the same actions which you are taking against our client. In addition, as you and everyone else in Lehigh County well knows, there are hundreds of other business

activities throughout Lehigh County which would have to be included in your prosecutions. We repeat that it is not our desire to see other establishments subjected to the same arrests, threats, and harassment to which our client is being subjected; but there is an underlying and basic principle of justice in question in this matter: if you, as the District Attorney of Lehigh County, believe that the Blue Laws are valid and applicable as to our client, why do you not apply them with equal force to the hundreds of other Sunday businesses and activities in the county which are covered by them?

Very sincerely yours,

GEORGE J. JOSEPH

GJJ:brk
Encl.

[fol. 386] EXHIBIT NO. 6

BUSINESS ESTABLISHMENTS SHOPPED ON SUNDAY, DECEMBER 22, 1957.

Name and Address	*Item Purchased*
Allentown:	
Economy Store Turner & Fourth Streets	Lighter Fluid X'mas Cards
Airport Inn ABE Airport	Gillette Blades
Walp's Diner Union Boulevard	Baby Shoes
Berton Bros. Union Boulevard	Flashlight Batteries
Tropical Super Market Union Boulevard	Mantle Decorations & Plastic Stars
Leonard's Blvd. Market Union Boulevard	Donald Duck Bank

Name and Address	*Item Purchased*
Allentown:	
Cookies Cut Rate 442 Hanover Avenue	Tool Kit Toy
A. B. E. Airport Allentown	4 Angels
V. Pagano 240 E. Hamilton Street	Floor Wax
Elvin Ramer Atlantic Service Station Hanover Ave. near Fourth	2 Batteries
Anthony Scotta 416 Tilghman Street	2 Batteries
[fol. 387]	
R. G. Neff 467 Tilghman Street	Battleship & Forklift Toys
West End Pharmacy 17th and Union Streets	Color Forms Toy
Shell Service Station 15th and Gordon Streets	Windshield Washer Wax
Rosenblatt's Delicatessen 20th, Cedar and Washington Streets	Pride Wax
Variety Store 16th and Tilghman Streets	Twin Dolls
Tony Kraipovich Atlantic Gas Station 30th and Tilghman Streets	Ever-Ready Flash-light Batteries
Sterner's Brothers 522 North 19th Street	Lassie Play Kit
Harry J. Houck Drugs 19th and Allen Streets	Man's Brush and Comb X'mas cards
John Gould Main Street near 3rd Emmaus, Pennsylvania	Toy Machine Gun Sm. Stocking

Name and Address	*Item Purchased*
Groceries Store 215 Main Street Emmaus, Pennsylvania	2 Bull Dogs
Alton Park Pharmacy 3035 Lehigh Street Allentown, Pennsylvania	Foam Toy Blocks
Groceries 919 South 6th Street	Ronson Lighter Fluid Ball Point Pen
[fol. 388]	
Allentown:	
Lehigh Super Market 1200 Lehigh Street	Doctor Kit Harmonica
Table Supplies South 4th and Susquehanna Streets	Kleenex—Razor Blades Toy Stocking
Highway Fruit Market South 5th Street	Bingo Game Sports Car
Smith's Dinette 1200 Susquehanna Street	Toy-a-peal Birthday Card
Aaron's E. Susquehanna and S. Albert Streets	Toy Car
R. G. Neff 467 Tilghman Street	Greyhound Bus
Gil's 401½ Gordon Street	Esso Lighter Fluid
Herbst 240 5th and Chew Streets	Toy—Merry Dolly's Linie Closet
Smith's Market Rt. 309 S. 4th Street	Thumb Tacks
Ray Gulf Service Rt. 309 S. 4th Street	2 Sportsman Bat- teries

Name and Address	*Item Purchased*
Allentown:	
Brantleys 388 Union Street	Windex
Frank Zeky 556 N. 4th Street	Brush
Frank Jucknik Cross Iron Lehigh Valley Farms 7th Street Pike	J-Wax
[fol. 389]	
Ziekies Food Store 249 North 5th Street at Chew	Shoe Polish
Hocks Gulf Station 7th and Walnut Streets	4 Batteries
Rissmiller Gas Station 5th and St. John Streets	Flashlight
Gerhart Gas Station 7th and Liberty Streets	Auto Polish & Cleaner
Schmidt's Highway Market St. John Street	Toy-play Drill Film
Robt. Clauss Gas Station St. John Street	Window Washer
Smith's Market 1904 4th Street	Toy, Candles & Wrapping Paper
Jack Young Mountainville Gas Station	(Copy Illegible)
Esso Station 5th and Turner Streets	Vista Wax
Economy Store 401 Turner Street	Wax
Ritter's Pharmacy 406 Washington Street	2 Toy Models
Mitchell's Cut-Rate 6th & Washington Streets	China Toy Bank

Name and Address	*Item Purchased*
Allentown:	
Eline's Cut-Rate 753 North 4th Street	Toy Top Spray
——— Meat Market 647 North Front Street	Broom Scotch Tape
[fol. 390]	
Seronovels 714 North Front Street	Rope
Bartniks 201 North 2nd Street	Auto Wax
Economy Store 429 Liberty Street	Toys, Blocks & Shoe Polish
Anthony Scotter 4th and Tilghman Streets	Sera-Lux Wax
Savarese & Sons Market 501-503 North Front Street	Rope & Wax
Lobus 543 North Front Street	Auto-plate Wax Windex
Bause's Drug Store 7th Street Pike	Traveling Kit, Shaving Lotion & Powder
Lehigh Valley Railroad Station Hamilton Street	Perfumed Pen Coloring Book
Nemeth's Meat Market 533 North 8th Street	Pipe, Pen Holder & Spray Deodorant
Enetts Grocery Store 810 Union Street	Sponge Scotch Tape Dispenser
Ritter's Texaco Gas Station Tilghman Street near 14th	Window Cleaner
Fink's Food Market 1601 Tilghman Street	Toy Furniture Screw Driver
Geiger West End Market 1148 Tilghman Street	Girl's Pants, Electric Plug & Cookie Cutter

Name and Address	*Item Purchased*
Allentown:	
Henry Drug Store 1251 Chew Street	Beauty Box Thumb Tacks
[fol. 391]	
Atlantic Gas Station 12th & Hamilton Streets	Battery
Cookies Confectionery	Hand Cream, Lighter Fluid & Wrapping Paper
Drugs 501 North 10th Street	Corn Pads
Christman's Market 231 North 10th Street	Sponge Mop
Cut-Rate Luncheonette 248 North 9th Street	Rubber Pants Tintex Dye
Groceries 825 North 8th Street	Skip Rope Thumb Tacks
Wienders Texaco Gas 6th and Turner Streets	Windshield Washer Fluid
Canfield Esso Station Tilghman at 15th Street	Batteries
Market 838 Tilghman Street	Corsage
B. S. Smoke Shop 957 Hamilton Street	Ash Tray Rubber Snake Toy
Sweet Shop 959 Hamilton Street	Corsage
A. Scotta Altice Gas Station Tilghman Street	Window Cleaner
R. G. Neff 456 Tilghman Street	Paint Set Birthday Card
Dolly Madison Hamilton Street at 11th	Santa Claus Toy

[fol. 392]

EXHIBIT No. 7

December 27, 1957

Paul A. McGinley, Esq.
445 Hamilton Street
Allentown, Pennsylvania

In re: Two Guys from Harrison

Dear Paul:

I am enclosing herewith, for your files, a list of the business establishments which were shopped in Lehigh County on Sunday, December 22, 1957 and the various items which were purchased at the respective stores.

Very truly yours,

MORRIS EFRON

MEzesl
Enclosure
cc: George Joseph, Esq.

[fol. 393]

EXHIBIT No. 8

LIST OF BUSINESS ESTABLISHMENTS SHOPPED ON SUNDAY, DECEMBER 22, 1957.

Brownies Market 550 Dalton Street Emmaus, Pennsylvania	Shoe Laces 2 Boxes Tintex Dye
Mountain Dew Market Allentown, Pennsylvania	Turpentine
Bill Reichl—Shell Station Allentown, Pennsylvania	Batteries
Kern's Market Allentown, Pennsylvania	Batters, Gun, & Book

Grocery Store 16th and Tilghman Streets Allentown, Pennsylvania	Log Cabin, Blocks, Gum, & Card
Strausser's 1001 19th Street Allentown, Pennsylvania	Gun & Holster Set, Papers & Card
Americus Pharmacy 723 19th Street Allentown, Pennsylvania	Rubber Doll & Card
Sterner Brothers 19th and Liberty Streets Allentown, Pennsylvania	Burp Gun
Klein's 17th and Union Streets Allentown, Pennsylvania	Horseshoe Game
West End Pharmacy 17th and Union Streets Allentown, Pennsylvania	Sports Car & Card

[fol. 394]

Deiley's West End Market Allentown, Pennsylvania	Crayons
Kivert's 2246 Liberty Street Allentown, Pennsylvania	Howdy-Doody Toy
Leminger Pharmacy 1402 Linden Street Allentown, Pennsylvania	GE R R 2 Bulb
Lehigh Super Market Allentown, Pennsylvania	Lighter Fluid
45 South Jefferson Street Allentown, Pennsylvania	Sponge
West End Pharmacy Allentown, Pennsylvania	Light Bulb

Delicatessen South Madison & Union Streets Allentown, Pennsylvania	Rubber Bands
D. L. Walter Pharmacy 1301 Hamilton Street Allentown, Pennsylvania	Binky's Teether
Bert Bickel's Luncheonette Allentown, Pennsylvania	Cigarette thru Handkerchief
B & S Smoke Shop Allentown, Pennsylvania	Squirt Ring
Y—B—on 6th Street Allentown, Pennsylvania	Flints & Wicks
Pat & Bernies 8th and Linden Streets Allentown, Pennsylvania	T. V. Guide
West End Pharmacy Allentown, Pennsylvania	Thermos & Deodorant

[fol. 395]

Aaron's Cut-Rate Albert Street & E. Susquehanna Allentown, Pennsylvania	Model Airplane
Bradford Market Emmaus Avenue & Bradford Street Allentown, Pennsylvania	Hair Spray & Shoe Polish
Smith's Market S. 4th Street, Mountainville Allentown, Pennsylvania	Thermos Jug
East End Drug Allentown, Pennsylvania	Airplane Model
L. Hoffman, Better Shoes 201 E. Union Street	Model Airplane
Woody's 252 E. Hamilton Street Allentown, Pennsylvania	Plastic Model Airplane

DeRoner's Market Allentown, Pennsylvania	Windex & Mop
Esso Station Fulton & Tilghman Streets Allentown, Pennsylvania	Waxton & T
Hunsicker's Esso Station 18th and Tilghman Streets Allentown, Pennsylvania	Wax
Shorty Peter's Esso Station 7th St. Pike—across from Penn Fruit Allentown, Pennsylvania	Batteries
Harry Hawk—Shoemaker's Successor 19th and Allen Streets Allentown, Pennsylvania	Flash Bulbs
[fol. 396]	
Strauss Market 1001 19th Street Allentown, Pennsylvania	Toy Puppet & Film
Grocery Store 1601 Tilghman Street Allentown, Pennsylvania	Toy Lantern & Scotch Tape
Gulf Service Station Corner of Congress St. & Roth Ave. Allentown, Pennsylvania	Flashlight, Lighter Fluid & Batteries
Gulf Service Station N. 13th Street—corner Allentown, Pennsylvania	Car Polish
Drug Store Tilghman Street	Flashbulbs & Film
Ruderts Market 1123 Tilghman Street Allentown, Pennsylvania	2 Batteries & Pen

Fruit Market Between 8th & 9th on Tilghman St. Allentown, Pennsylvania	Lantern
Cookie's Confectionery N. 10th Street Allentown, Pennsylvania	Writing Paper, Envelopes & Paint Brush
Grocery Store 826 N. 7th Street Allentown, Pennsylvania	Film
Grocery Store 752 N. 9th Street Allentown, Pennsylvania	Bubble Bath & Razor Blades
Tropical Market Allentown, Pennsylvania	Candles

[fol. 397]

Stelz Cut Rate 448 N. 2nd Street Allentown, Pennsylvania	Hair Color Streak
Cookie's Cut Rate 440½ Hanover Avenue Allentown, Pennsylvania	Rubber Ball & Gift Wrap Tie-On
Cookie's Confectionery Allentown, Pennsylvania	Color Cones (Toy)
Mitchel's Cut Rate 6th & Washington Streets Allentown, Pennsylvania	Toy Boxing Gloves
Goodie Shop 32 N. 10th Street Allentown, Pennsylvania	Pen
Grocery Store 301 N. 9th Street Allentown, Pennsylvania	Funny Papers & Toy Racer
Smoke Shop Allentown, Pennsylvania	Book & Halo Shampoo

[fol. 398] EXHIBIT No. 9

January 3, 1958

Paul A. McGinley, Esq.
445 Hamilton Street
Allentown, Pennsylvania

In re: Two Guys from Harrison

Dear Paul:

I am enclosing herewith, for your files, a list of the business establishments which were shopped in Lehigh County on Sunday, December 29, 1957 and the various items which were purchased at the respective stores

Very truly yours,

MORRIS EFRON

ME:esl
Enclosure
cc George Joseph, Esq.

[fol. 399]

EXHIBIT No. 10

Telegram sent December 14, 1957, by Two Guys From Harrison—Allentown, to District Attorney Paul A. McGinley, 3104 Chew Street, Allentown, Pennsylvania:

Prior to last Sunday December 7, 1957 we consulted Attorneys Morris Efron and George Joseph of the Lehigh County Bar regarding your personal opinion that Sunday sales of various items in our store on 7th Street Pike are prohibited by law. We sought their legal counsel and advice to determine whether we could open our store on Sunday December 7 1957 and succeeding Sundays. They advised us that in their opinion the law which you threatened to invoke is inconsistent with basic constitutional principles and further that said law excepts sales of type made in our store. We are acting under this advice believing honestly that

our operation is lawful. We have no thought or intent of breaching or violating any law. Your personal determination of the applicability of the law differs from the legal opinion given us by our counsel. This issue is of vital importance because it encompasses every conceivable type of business and personal activity. As you know our store is only one of many hundreds of businesses and thousands of activities on a Sunday. There are many factories and industrial plants in operation. Newspapers are published and distributed. There are many markets and drug stores which handle numerous items other than food and emergency drugs. Bowling alleys are open. Amusement parks, golf courses, fairgrounds and swimming pools are open. Newspapers, magazines and other literature are sold [fol. 400] in many establishments. Cigarettes are sold in hundreds of places. Music vending machines are in operation in many places. Clubs are open. Greenhouses are open. Model houses are open for the purpose of realty sales. Many gasoline stations are open and many of them handle items other than gasoline. Hundreds of tradesmen and craftsmen operate either full time or part time. Much business is transacted on telephones. Concerts and other forms of entertainment are given. Many types of meetings are held. Individuals engage in all sorts of activity and diversion. Your personal interpretation of the law would bring all of this to an end. We believe that only the Courts can properly determine whether that is the meaning of the law.

[fol. 401]

EXHIBIT No. 11

January 4, 1958

Paul A. McGinley, Esq.
District Attorney's Office
445 Hamilton Street
Allentown, Pennsylvania

In re: Two Guys from Harrison-Allentown, Inc.

Dear Mr. McGinley:

I have, for the past number of weeks, forwarded to you weekly the names of business establishments in Lehigh County at which items were purchased similar to those sold at the business establishment of Two Guys from Harrison-Allentown, Inc. This was done, as you know, in order to indicate to your office that there has been a discriminatory interpretation and enforcement of the so called "Sunday Statute".

Since supplying this information did not achieve any results, I have decided that I will not hereafter furnish your office with such lists but I do feel it proper to direct your attention to the fact that there are many business and industrial establishments which have been operating and will undoubtedly, continue to operate on Sundays in Lehigh County. To be consistent in the position which you have taken, you should proceed against these establishments just as you have against my client.

Very truly yours,

MORRIS EFRON

ME:amt
cc: George Joseph, Esq.

[fol. 402]

EXHIBIT No. 12

OFFICE OF THE
DISTRICT ATTORNEY OF LEHIGH COUNTY
445 HAMILTON STREET
ALLENTOWN, PA.

PAUL A. McGINLEY
District Attorney

ERNEST F. RITTER
First Assistant District Attorney

ROBERT LESKO
Assistant District Attorney

MARK GEARHART
Assistant District Attorney
January 9, 1958

Morris Efron, Esq.
502 Hamilton Street
Allentown, Pennsylvania

In re: 2 Guys from Harrison-Allentown, Inc.

Dear Mr. Efron:

I have your letter of January 4, 1958, in which you inform me that you will no longer have agents of the above named corporation make purchases on Sunday for the purpose of showing that our interpretation and enforcement of the Sunday Shopping Laws have been discriminatory.

We have repeatedly asked for your cooperation as long as you had the names of establishments in this matter. Each one of your lists which you provided failed to name any defendant or individual whom you alleged was guilty of the Sunday Sales Law. If you intended that we proceed [fol. 403] on information received, you did not name for us any individual who could be arrested. As you well know, you can't arrest an inanimate establishment, and therefore, the lists you have given us have been useless. It is our feeling that your agents should proceed to the

Alderman's office and swear out an information in each of the cases in which you complain, since otherwise there will be no proof of identity. If your agents are unable to identify the alleged lawbreaker, then certainly we are not in a position on information received to make the identification.

I may also call to your attention that at no time did you give us the name or names of your agents who allegedly made these purchases so that we could if we felt it feasible, proceed with the cases on information received.

Since law enforcement is the obligation of all people in the community, we feel that your agents who did the actual purchasing should be the ones to swear to the informations.

Sincerely yours,

PAUL A. MCGINLEY
Paul A. McGinley
District Attorney

pam/vs

[fol. 404] EXHIBIT No. 13

WESTERN UNION
TELEGRAM

P ALA005 LONG PD=ALLENTOWN PENN 17 701AME=

=ATTORNEY GENERAL
THOMAS MC BRIDE= STATE CAPITOL HARRISBURG PENN

=WE ARE INFORMED LEHIGH COUNTY DISTRICT ATTORNEY MEETS WITH YOU TODAY REFERENCE SUNDAY BLUE LAWS. SINCE OUR STORE HAS BEEN SINGLED OUT BY HIM FROM AMONG HUNDREDS OF SUNDAY BUSINESS OPERATIONS WE SHOULD GIVE YOU SOME IDEA OF BACKGROUND OF MATTER AT THIS TIME AND REQUEST OPPORTUNITY MEET WITH YOU EARLY DATE TO FURTHER EXPLAIN AND CLARIFY

FACTS AND EVENTS OUR STORE OPEN ONLY SINCE OCTOBER 22 1957. PRIOR THERETO NO INTEREST TAKEN BY LOCAL OFFICIALS IN ANCIENT BLUE LAWS. IN FACT IN APRIL 1957 LOCAL DISTRICT ATTORNEY RIDICULED IDEA OF ENFORCING ANCIENT LAW WHEN REQUESTED AND REFUSED TAKE ACTION IN RESPECT THERETO. IMMEDIATELY AFTER WE OPENED OUR STORE WE BECAME ENGAGED IN COMPETITIVE STRUGGLE WITH ONE LOCAL MERCHANT AND SHORTLY THEREAFTER DISTRICT ATTORNEY SUDDENLY ANNOUNCED HIS INTENTION TO INVOKE LAW [fol. 405] AGAINST US. DISTRICT ATTORNEY THEN PROCEEDED TO SUBJECT US AND OUR EMPLOYEES TO MULTIPLICITY OF ARRESTS AND CONSTANT THREATS AND HARASSMENT WHILE AT SAME TIME REFUSING TAKE COGNIZANCE OF HUNDREDS OF OTHER SUNDAY BUSINESS ACTIVITIES IN LEHIGH COUNTY. FACTORIES AND INDUSTRIES OPERATE. LAST SUNDAY OUR STORE WAS PICKETED ILLEGALLY BY MEMBERS OF UNION AT MACK MFG CORP THIS COMPANY OPERATES SUNDAYS. DRUGSTORES AND MANY MARKETS OPERATING IN REALITY AS DEPARTMENT STORES ARE OPEN HANDLING NUMEROUS NON-ESSENTIAL ITEMS. OVER FIFTY PERCENT OF OUR STORE IS DEVOTED STRICTLY TO FOOD AND DRUGS BUT OUR STORE HAS BEEN SINGLED OUT WHEREAS MANY STORES HANDLING MANY NON-ESSENTIAL ITEMS HAVE BEEN ALLOWED TO OPERATE WITHOUT ARREST OR OTHER ACTION. MAJOR PHILADELPHIA DEPARTMENT STORES SOLICIT SUNDAY PURCHASES THROUGHOUT OUR COUNTY BY TELEPHONE. NO ACTION TAKEN AGAINST THEM. WE ARE INVESTING ONE-QUARTER MILLION DOLLARS IN SWIMMING POOL AND AMUSEMENT PARK AT OUR STORE. DISTRICT ATTORNEY REFUSES CLARIFY SITUATION BY STATING WHAT ACTION IF ANY WILL BE TAKEN WITH REFERENCE TO DORNEY PARK AND OTHER AMUSEMENT PARKS AND SWIMMING

POOLS THROUGHOUT COUNTY. HE REFUSES TO STATE WHETHER ALLENTOWN FAIR GROUNDS WILL BE ALLOWED TO CONTINUE SUNDAY OPERATION. LAST SUNDAY DECEMBER 8TH OUR [fol. 406] SHOPPERS PURCHASED NON-ESSENTIAL ITEMS AT FIFTY FIVE BUSINESS ESTABLISHMENTS IN COUNTY. WE GAVE LIST TO DISTRICT ATTORNEY BUT HE REFUSED TAKE ACTION DESPITE FACT HE ARRESTED SEVENTY-SEVEN OF OUR EMPLOYEES. SUNDAY DECEMBER 15TH OUR SHOPPERS MADE PURCHASES OF NON-ESSENTIAL ITEMS AT SEVENTY SIX BUSINESS ESTABLISHMENTS IN COUNTY AND WE INTEND FORWARD INFORMATION TO DISTRICT ATTORNEY BUT HE HAS ALREADY INDICATED HE WILL NOT TAKE ACTION TOWARDS THEM. ON SUNDAY DECEMBER 7TH DISTRICT ATTORNEY AND ALLENTOWN POLICE SECURED NAMES OF OPERATORS AND EMPLOYEES OF BOWLING ALLEYS OPEN THROUGHOUT COUNTY AND ANNOUNCED PROSECUTIONS WOULD BE BROUGHT. HOWEVER TWO DAYS LATER DISTRICT ATTORNEY ANNOUNCED HE WOULD NOT PROSECUTE AND BOWLING COULD CONTINUE ON SUNDAYS. NUMEROUS GASOLINE STATIONS HANDLING NON-ESSENTIAL ITEMS HAVE BEEN LEFT ALONE. MODEL HOUSES ARE OPEN FOR REALTY SALES. THESE ARE BUT A FEW EXAMPLES OF HUNDREDS OF BUSINESS ACTIVITIES IN OUR COUNTY. NO ATTEMPT HAS BEEN MADE BY DISTRICT ATTORNEY OR OTHER OFFICIALS TO INTERFERE WITH ANY OPERATION OR ACTIVITY EXCEPT OURS AND THREE OR FOUR OTHERS. WE HAVE REPEATEDLY SOUGHT REASON FOR THIS DISCRIMINATORY ACTION BUT HAVE NOT RECEIVED IT. THOUSANDS OF PEOPLE CANNOT UNDERSTAND WHY WE HAVE BEEN SINGLED OUT. [fol. 407] EVERYONE IS TALKING ABOUT IT. THEY ARE ASKING WHETHER THE DISTRICT ATTORNEY IS GOING TO BE CONSISTENT IN HIS POSITION AND TAKE ACTION AGAINST THE ACTIVITIES MENTIONED ABOVE AND MANY OTHERS.

WE REPEAT THAT ALL THIS CAME ABOUT SUDDENLY AFTER WE BEGAN TO ENGAGE ANOTHER LOCAL MERCHANT IN COMPETITION. WE HAVE AT ALL TIMES ACTED IN GOOD FAITH AND UNDER ADVICE OF COUNSEL. IF THE DISTRICT ATTORNEY BECOMES FAIR AND CONSISTENT IN HIS POSITION AND IF HIS POSITION IS CORRECTLY TAKEN UNDER THE LAW A RADICAL CHANGE WOULD BE MADE ON THE WAY OF LIFE IN LEHIGH COUNTY AND OF COURSE THROUGHOUT THE ENTIRE STATE OF PENNSYLVANIA. WE SINCERELY BELIEVE THIS CAN PROPERLY BE DETERMINED ONLY BY THE COURTS, OR BY LEGISLATIVE ACTION AND LOCAL REFERENDUM. WE HAVE IN OUR POSSESSION MANY THOUSANDS OF PETITIONS SIGNED BY RESIDENTS OF OUR COUNTY ASKING FOR LOCAL REFERENDUM ON THE QUESTION. THESE ARE BUT A FEW OF THE FACTS. WE EARNESTLY AND RESPECTFULLY REQUEST AN EARLY OPPORTUNITY TO DISCUSS THE MATTER WITH YOU IN DETAIL.

TWO GUYS FROM HARRISON—ALLENTOWN, INC.

[fol. 408] EXHIBIT No. 14

G 1958 MAR 2 PM 242
ALLENTOWN PA

ERNEST RITTER
FIRST ASST DIST ATTY OF LEHIGH COUNTY
804 NORTH OTT ST

TWO COUNTY DETECTIVES VISITED TWO GUYS FROM HARRISON STORE TODAY TO MAKE BLUE LAWS ARREST IN CONTINUANCE OF YOUR DISCRIMINATORY PROGRAM AGAINST TWO GUYS EMPLOYEES. IF YOU WANT TO ELIMINATE DISCRIMINATION AND ENFORCE THE LAW SINCERELY WITH EQUAL JUSTICE SUGGEST YOUR STAFF VISIT HOME SHOW THIS AFTERNOON AGRICULTURAL BUILDING ALLENTOWN

GEORGE J JOSEPH AND MORRIS EFRON

[fol. 412]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed November 24, 1959

A.

FINDINGS OF FACT

The Parties and Jurisdiction

1. Plaintiff is a Pennsylvania corporation engaged in the operation of a retail store in Whitehall Township, Lehigh County, Pennsylvania, employing approximately 300 persons (Plaintiff's Brief, p. 2). All page references hereafter are to plaintiff's brief unless otherwise noted.

2. The store is located along the 7th Street highway outside the City of Allentown, with a parking lot for several thousand automobiles, and caters to persons interested in economy as against more expensive department store services (p. 2).

3. Defendant is the District Attorney of Lehigh County, Pennsylvania (N.T. 3).

4. The amount in controversy exceeds $10,000, exclusive of interest and costs (N.T. 3).

5. The controversy arises under the Constitution of the [fol. 413] United States and the Civil Rights Act, 42 U.S.C. §1983, to prevent the deprivation under color of state law of a right secured by the Constitution of the United States (N.T. 4).

The Pennsylvania Sunday Laws

6. The Pennsylvania Sunday Law, originally adopted April 22, 1794, 3 Sm. L. 177 §1, as codified by the Penal Code of 1939, 18 Purd. Stat. §4699.4, provides as follows:

"Whoever does or performs any worldly employment or business whatsoever on the Lord's Day, commonly

called Sunday (works of necessity and charity only excepted), or uses or practices any game, hunting, shooting, sport or diversions whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.

"Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bakehouses, lodging-houses, inns and other houses of entertainment for the use of sojourners, travellers, or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families on the Lord's Day, commonly called Sunday, nor to the de[fol. 414] livery of milk or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day." (p 2)

7. The Pennsylvania Amendatory Act of August 10, 1959 provides as follows:

"Whoever engages on Sunday in the business of selling, or sells, or offers for sale on such day at retail, clothing and wearing apparel, clothing accessories; furniture, housewares, home, business, or office furnishings, household, business, or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage musical instruments and recordings, or toys, excluding novelties and souvenirs, shall upon conviction thereof in a summary proceeding for the first offense be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense. . . ." (pp. 21-2)

8. There are also a number of other Pennsylvania statutes creating exceptions to the Act of 1794 or increasing the penalties for conducting activities prohibited thereby. [fol. 415] These statutes now make it lawful, despite the prohibition of the 1794 Act: to operate a motion picture house after 2:00 P.M. on Sunday, Act of July 2, 1935, P.L. 599, 4 Purd. Stat. §59 et seq.; to play professional baseball and football after 2:00 P.M. and before 6:00 P.M. on Sunday, Act of April 25, 1933, P.L. 74, 4 Purd. Stat. §81 et seq.; to stage musical concerts under state supervision after 12:00 noon on Sunday and to compensate musicians participating in such concerts, Act of June 2, 1933, P.L. 1423, No. 308, 4 Purd. Stat. §121 et seq.; to play polo after 1:00 P.M. and before 7:00 P.M. on Sunday, Act of June 22, 1935, P.L. 446, 4 Purd. Stat. §151 et seq.; to play tennis after 1:00 P.M. and before 7:00 P.M. on Sunday, Act of June 22, 1935, P.L. 449, 4 Purd. Stat. §181 et seq.; to fish on Sunday, Act of April 14, 1937, P.L. 312, §1, as amended, 30 Purd. Stat. §265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P.L. 1225, Art. VII, §702, as amended, 34 Purd. Stat. §1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P.L. 90, Art. IV, §406, as amended, 47 Purd. Stat. §4-406. (pp. 71-2). The Act of July 8, 1957, P.L. 565, Sec. 1, 18 Purd. Stat. §4699.9 makes it unlawful to sell motor vehicles on Sunday.

9. Sunday is a holy day to Christians, with the exception of certain Seventh Day Sabbatarians, such as the Seventh Day Adventists and the Seventh Day Baptists. Sunday commemorates and honors the Resurrection of Christ. It is a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter. (pp. 22-28).

10. Traditionally, among Christian peoples, since at least the time of the first Christian Emperor who sought [fol. 416] to make Christianity the official religion of the Roman Empire, Constantine, in approximately the year 320 A.D., an essential part of the celebration of the religious nature of Sunday has been refraining from certain work and other worldly activities (pp. 24, 41-59).

11. The Supreme Court of Pennsylvania, in discussing and sustaining the validity of Sunday legislation has repeatedly denominated it as legislation in aid and support of the Christian religion, and held it valid because Christianity is part of the common law and of the law of the Commonwealth of Pennsylvania. (pp. 32-36).

12. The Act of 1959 is the present culmination of more than two hundred years of development of Sunday legislation in Pennsylvania and was adopted for the purpose of imposing heavier penalties in order to stop the open and notorious violation of the Act of 1794 as codified by the Act of 1939 (p. 27, Plaintiff's Reply Brief, pp. 1-3).

13. The Pennsylvania Sunday Laws above referred to are religious laws, enacted to prevent the profanation of the Christian holy day, the Lord's Day (Sunday), and to compel honor and respect to Christianity and to the doctrine and event of the Resurrection, by compulsory prohibition of certain kinds of work or other worldly activities on that day (pp. 24, 41-59). The statutes which have created certain exemptions from the general prohibitions of the Act of 1794 restrict the hours of such exempted activities to those after the morning and before the evening Christian church services for the same purpose (pp. 71-72, Request for Findings 6-12 *supra*).

14. The statutory prohibition against Sunday work is offensive to those religious groups which do not honor Sunday as a holy day or as a day commemorating a religious [fol. 417] doctrine to which they are opposed and which they believe is fallacious (pp. 24-30, 4-20, 89-98).

15. The Commonwealth of Pennsylvania, like the Federal Government, has enacted a pattern of genuine economic laws under the police power, regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P.L. 1024, §3, as amended, 43 Purd. Stat. §103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P.L. 286, §4, as amended, 43 Purd. Stat. §46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 189[illegible],

P.L. 113, §1, 43 Purd. Stat. §346 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P.L. 159 §1, 43 Purd. Stat. §481; the Act of July 2, 1937, P.L. 2766, 43 Purd. Stat. §921-931 (persons can work only 5½ days in any period of seven consecutive days) (p. 64).

16. Defendant admits Sunday work at plaintiff's store is not injurious to the health or welfare of either the employes or customers of the store (p. 2).

17. The Pennsylvania Sunday Laws have not been enacted for reasons of or for a purpose connected with the health, safety, morals or general welfare of the inhabitants of the Commonwealth, but have been enacted for the purpose of establishing and enforcing compliance with religious doctrines of the Christian religion (pp. 63-64, Requests for Findings of Fact 15, 16).

[fol. 418] Statutory Discrimination

18. By Pennsylvania legislation (and case law), the playing of professional baseball and football is permitted but golf and basketball are prohibited; movies are permitted, but the legitimate theatre is not; gasoline may be sold and transit systems and cars operated, but automobiles may not be sold (p. 82).

19. The fine for the generality of offenses, including tennis, is $4.00, plus costs, that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 Purd. Stat. §4651, 4 Purd. Stat. §82, for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 Purd. Stat. §127. For persons selling motor vehicles used on highways at retail or wholesale, the fine is $100 for engaging in business the first Sunday and $200 thereafter. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner, it's $100 for each sale (not each Sunday) at retail, but only $4.00 at wholesale. Slip covers for automobile seats can be sold all day Sunday for $4.00; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200

for each and every sale thereafter, and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $200 category. The sale of a house involves at most only a $4.00 fine, but the sale of slipcovers for a sofa or chair in the house calls for a $200 fine. The purchase of a musical instrument requires a $200 fine, but the sale of portable radios calls for only $4.00 per day (pp. 82-83).

[fol. 419] 20. Wholesale sales, as for example in lots of 12 or 100 or 144, are subject to a $4.00 fine for the whole day's activity, whereas each retail sale of the very same item is subject to a $200 fine (pp. 21-2).

21. It is unreasonable to distinguish, upon the basis of protecting the public health, safety, morals or welfare, between the activities which have been included and those which have been excluded, from the Pennsylvania Sunday Laws. (See Requests for Findings of Fact, 18 to 20, supra.)

22. It is unreasonable to distinguish, upon the basis of protecting the public health, safety, morals or welfare, between the fines payable for conducting various activities on Sunday. (See Requests for Findings of Fact, 18 to 20, supra.)

23. The Pennsylvania Sunday Laws are arbitrary and discriminatory. (See Requests for Findings of Fact, 21, 22, supra.)

Discriminatory Enforcement

24. The Sunday Laws were not enforced in Lehigh County by defendant District Attorney from the time he took office in January, 1956 until December 2, 1957. A request made to him in the Spring of 1957 that he enforce these laws against retail merchants was refused by him on the ground that the Act went back to the "horse and buggy days" and if it were enforced to the letter, practically everything would be shut down on Sunday (pp. 74-5).

25. The Sunday Laws had not been enforced by his predecessors in office or by any public official or private person in Lehigh County for at least six years prior to December, 1957 (p. 73).

26. Before plaintiff commenced its operations in Whitehall Township, Lehigh County, it inquired of the Township officials as to whether the law had been enforced in the Township and as to whether it would be enforced. Plaintiff [fol. 420] was informed by these officials that the law had not been enforced and would not be enforced. In reliance upon this, plaintiff invested in excess of $1,000,000 in the construction of its store and commenced operations in October, 1957 (p. 80).

27. There was no protest, public or private, against the Sunday operation of plaintiff's store prior to the campaign to close plaintiff's store commenced December 3, 1957 by Max Hess, Jr., owner and head of Hess Bros. Department Store in Allentown (p. 75).

28. Approximately one-third of plaintiff's gross business is done on Sunday and its Sunday operations are vital to its existence, since its ability to make a profit is wholly dependent upon Sunday sales, its overhead being defrayed in large part by its Sunday volume. Sunday volume is as much as $100,000 per Sunday with as many as 10,000 transactions or more. If Hess had been successful in requiring plaintiff to close Sunday, he would have been successful in putting plaintiff out of business (p. 3; Def's. Requests for Finding of Fact No. 6).

29. On December 3, 1957, the Hess Department Store advertised that it was going to be open on Sundays, accompanied by press releases to the effect that it was doing this in order to compel plaintiff to close (p. 75).

30. Defendant immediately called a meeting of the law enforcement officers in the county. A Hess lawyer was present with the public officials (p. 76).

31. From this meeting there emerged a mandate from defendant to all local law enforcement officers to enforce the Sunday Blue Laws and defendant took it upon himself per-

sonally, with almost his entire staff, to make mass arrests at plaintiff's store. This was an unusual procedure for the District Attorney, and was at variance with his response to the request that he arrest the Fountain Hill people six months earlier and his reply to the lists of violators fur- [fol. 421] nished him by plaintiff, namely that plaintiff should go to an alderman and swear out a warrant, with the District Attorney appearing only in the event of an appeal (p. 76).

32. Hess then announced that he was not going to keep his store open on Sunday (p. 76).

33. The defendant was not requested to enforce the Sunday Law by the Whitehall Township officials (p. 76).

34. During the same week of December 3, 1957, defendant acquired a one-third interest in a portion of a tract of land which Hess had been considering for at least two years as the site of a department store shopping center. The tract immediately adjoined a cement company property which was owned by Mr. Hess' father-in-law. Exactly one year later, Hess paid $200,000 to the McGinley group for the tract, netting them a substantial profit in excess of $20,000. The agreement of sale admittedly was executed on a Sunday (p. 77).

35. At the same time, defendant received from Hess a private payment of $2,600 on the sale of the adjoining tract which Hess had also previously been interested in and which passed directly from the prior owner to Hess. The transfer of this money to defendant was accomplished in a complicated transaction, in the form of a double payment of the real estate transfer tax, which he retained. He did not reveal this to his partners. He performed no service in this transaction which entitled him to any compensation. He was neither a broker nor an attorney in the matter (pp. 77-8).

36. Hess, despite the fact that he had general counsel and had a list of various other law firms in Allentown to be retained for certain services, at the same time paid fees to McGinley while he was District Attorney (p. 78).

37. Since December 3, 1957, as well as before, defendant has refused to enforce the Sunday Laws against golf courses, bowling alleys, other amusements, newspapers, [fol. 422] radio stations, manufacturing plants, many other merchants and other persons engaged in worldly employment on Sundays (pp. 73-74, 79).

38. Defendant's failure and refusal to enforce the Sunday Laws in any respect prior to December 3, 1957 was not caused by any lack of personnel (p. 79).

39. His selective enforcement of the Sunday Laws since that date, like his failure to enforce the Sunday Laws in any respect prior thereto was not caused by a lack of personnel, and is inconsistent with an intention to enforce the Sunday Laws to the extent of his ability reasonably to do so (p. 79).

40. In the light of the dealings between defendant and Hess Bros. Department Store, his selective enforcement of the Sunday Laws against plaintiff manifests an intent to enforce such laws in the manner desired by plaintiff's competitor, Hess Bros. Department Store (pp. 75-80).

41. Defendant's enforcement of the Sunday Laws against plaintiff is arbitrary, discriminatory and for an improper purpose (See Requests for Findings of Fact 38-40).

Need for Injunctive Relief

42. The enforcement of the Sunday Laws against plaintiff's employes, as threatened by defendant, will cause them not to work on Sundays. This will require plaintiff to close its store on Sunday, which will render its entire operation unprofitable (p. 3; Requests for Findings of Fact 28, supra.)

43. Unless enjoined, defendant will enforce the Sunday Laws against plaintiff's employes, thereby causing plaintiff to suffer irreparable harm.

[fol. 423] B.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this litigation under Sections 1343, 2281, Title 28 U.S. Code.

2. The instant three-judge court was properly convened pursuant to Section 2284, Title 28 U.S. Code, and has before it substantial federal questions for adjudication.

3. The Pennsylvania Act of 1794 as codified in the Penal Code of 1939, and the Amendatory Act of August 10, 1959, violate the First Amendment to the Constitution of the United States as applied to the State by the Fourteenth Amendment in that they provide for an establishment of religion.

4. Said Acts violate the First Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment in that they prefer one religion (the Christian religion) over every other religion, which rejects the concept that the Resurrection of Jesus Christ took place on the first day, or rejects those religious concepts based upon the birth and Resurrection of Jesus Christ.

5. Said Acts also violate the First Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment in that it forces those persons who have no religious beliefs whatsoever to pay homage to a basic concept of Christianity by refraining from worldly activities on the Lord's Day, Sunday.

6. Said Acts and the exemptions therefrom violate the Equal Protection Clause of the Fourteenth Amendment because there is no rational basis for the distinction between those activities covered and those not covered by said Acts and between the varied penalties provided for the sale of articles quite similar in nature, but calling for different penalties.

[fol. 424] 7. Said Acts violate the Due Process Clause of the Fourteenth Amendment because there is no rational

basis within the police power for thus depriving plaintiff of its property or plaintiff's employes and customers of their liberty.

8. Defendant's threatened enforcement of the said Acts against plaintiff is wilfully discriminatory, in violation of the Fourteenth Amendment to the Constitution of the United States.

9. Plaintiff has the right to raise the constitutional issues referred to in Conclusions of Law 3 to 8 supra, because the statutes complained of are unconstitutional and their enforcement will cause plaintiff a direct, measurable and substantial property loss.

10. If defendant is permitted to continue to enforce such unconstitutional statutes, plaintiff will suffer irreparable injury.

11. Plaintiff has no adequate remedy at law.

12. The permanent injunction prayed for should issue.

Respectfully submitted,

Harold E. Kohn, William T. Coleman, Jr., Louis E. Levinthal, Morris Efron, Oscar Brown, By Harold E. Kohn; Attorneys for Plaintiff.

Of Counsel: Harry A. Kalish, Dilworth, Paxson, Kalish, Kohn & Dilks, 2635 Fidelity-Philadelphia Trust Building, Philadelphia 9, Pennsylvania.

[fol. 425] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 427] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

[Title omitted].

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed November 23, 1959

Defendant requests the Court to make the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff is a Pennsylvania corporation engaged in operating a general retail department store business in Whitehall Township, Lehigh County, Pennsylvania.

2. The defendant is District Attorney of Lehigh County, Pennsylvania.

3. The amount in controversy exceeds $10,000.00.

4. Approximately one-third of plaintiffs' gross business is done on Sunday; but of this Sunday business itself, approximately one-third is done in the food, drug, bakery and restaurant departments, with the operation of none of which has defendant ever interfered or threatened to interfere.

5. Plaintiff is interested in operating its store seven days a week and began its operations in Lehigh County with the purpose of so doing.

6. Plaintiff's Sunday operations are vital to its existence, its ability to make a profit being wholly dependent on Sunday sales and its overhead being disproportionately defrayed by the addition of its Sunday volume.

7. Plaintiff, being a corporation, has no personal interest for or against religion; nor is it joined as parties plaintiff by any persons who have such an interest; nor does it rely [fol. 428] for standing on any specific persons with whom it

is connected, such as its employees or customers, who have such an interest.

8. Neither the Pennsylvania Act of June 24, 1939, P. L. 872, Sec. 699.4, nor the Pennsylvania Act of August 10, 1959, P. L. , adding Sec. 699.10 to the act of June 24, 1939, P. L. 872, reflects a legislative purpose to establish religion.

9. Private persons and groups of all interests and faiths both supported and opposed the passage of the Act of August 10, 1939, P. L. , for a variety of reasons, some religious, but the great majority being economic and social in nature.

10. Both the Pennsylvania Act of June 24, 1939, P. L. 872, Sec. 699.4, and the Pennsylvania Act of August 10, 1959, P. L. , adding Sec. 699.10 to the Act of June 24, 1939, P. L. 872, reflect a legislative purpose to promote the health, safety and welfare of the citizens of Pennsylvania.

11. Neither the Pennsylvania Act of June 24, 1939, P. L. 872, Sec. 699.4, nor the Pennsylvania Act of August 10, 1959, P. L. , adding Sec. 699.10 to the Act of June 24, 1939, P. L. 872, respects an establishment of religion; requires any person to recognize or refrain from recognizing any religious belief or observance or requires any person to act or refrain from acting in furtherance of any religious belief or observance.

12. The classifications of activities which may be conducted on Sunday and of goods and products which may not be sold on Sunday, as they appear either in the Act of June 24, 1939, P. L. 872, Sec. 699.4, or the Act of August 10, 1959, P. L. , adding Sec. 699.10 to the Act of June 24, 1939, P. L. 872, or by reference to other statutes of the Commonwealth of Pennsylvania, are designed to further the legislative purpose of promoting the health, safety and welfare of the citizens of Pennsylvania.

13. The classification of commodities appearing in the Act of August 10, 1959, P. L. , adding Sec. 699.10 to the Act of June 24, 1939, P. L. 872, reflects a legislative purpose to specify areas where the greatest problems of

enforcement of Sunday laws exist; and the heavier penalties provided for violations of this Act are designed to promote obedience to the Sunday laws in these areas.

14. The Pennsylvania Sunday laws did not pose a problem of law enforcement in Lehigh County, prior to December, 1957.

[fol. 429] 15. After the Pennsylvania Sunday laws began to pose a problem of law enforcement in Lehigh County, defendant's procedure in coping with this problem was designed to enhance enforcement in those areas of violation where the greatest abuses existed.

16. In meeting the problems of law enforcement posed by the Sunday laws, defendant was required to channel his activities toward the areas of greatest abuse by the physical limitations of his staff and the physical impossibility of apprehending every violator.

17. In addition to the preceding two reasons, in meeting the problems of law enforcement posed by the Pennsylvania Sunday laws, defendant made no arrests in connection with industrial operations or communications media because he believed that convictions resulting therefrom could not be sustained in the courts.

18. Most, if not all, business operations similar to plaintiff's obeyed the Pennsylvania Sunday laws, either voluntarily, by not opening at all or by closing at defendant's request, or after defendant acted to enforce these laws against them.

19. Defendant's enforcement of the Sunday laws in Lehigh County was neither initiated nor conducted as a result of any improper influence by Mr. Max Hess.

20. Defendant's legal representations of Mr. Max Hess and Hess Brothers Department Store were minor in nature and had no influence on defendant's official actions in connection with enforcement of the Pennsylvania Sunday laws.

21. Defendant's real estate transaction with Mr. Max Hess was wholly unrelated to and had no influence on defendant's official actions in connection with enforcement of the Pennsylvania Sunday laws.

Conclusions of Law

1. This Court has jurisdiction of this proceeding by virtue of 28 U. S. C. Secs. 1331, 1343, 2281 and 2284 and 42 U. S. C. Secs. 1981 and 1983.

2. Plaintiff has no standing to raise religious issues in this case.

3. Even if plaintiff has standing to raise the religious issues, neither the Pennsylvania Act of June 24, 1939, P. L. 872, Sec. 699.4, nor the Pennsylvania Act of August 10, 1959, P. L. , adding Sec. 699.10 to the Act of June 24, [fol. 430] 1939, P. L. 872, violates the Fourteenth Amendment to the United States Constitution as a law respecting an establishment of religion or interfering with the free exercise thereof.

4. Both the Pennsylvania Act of June 24, 1939, P. L. 872, Sec. 699.4, and the Pennsylvania Act of August 10, 1959, P. L. , adding Sec. 699.10 to the Act of June 24, 1939, P. L. 872, are regulations civil in nature, reasonably calculated to promote the health, safety and welfare of the citizens of Pennsylvania, and are thus enactments within the constitutional powers residing in the states of the union which do not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

5. The exceptions to and classifications in the Pennsylvania Sunday laws are reasonably designed to further the civil purposes of the statutes and do not discriminate arbitrarily in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

6. Defendant's enforcement of the Pennsylvania Sunday laws in Lehigh County was neither undertaken nor conducted in an unreasonable, arbitrary or discriminatory manner, nor with an evil intent and thus did not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

7. The temporary restraining orders heretofore granted in this proceeding should be dissolved.

8. Plaintiff's prayer for a permanent injunction should be denied.

9. Plaintiff's complaint should be dismissed.

Respectfully submitted,

Ernest F. Ritter, First Assistant District Attorney of Lehigh County; Harry J. Rubin, Attorney, Pennsylvania Department of Justice; Anne X. Alpern, Attorney General of Pennsylvania, Attorneys for Defendant.

Pa. Dept. of Justice, Main Capital Building, Harrisburg, Penna.

[fol. 43]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

TWO GUYS FROM HARRISON-ALLENTOWN, INC., Plaintiff,

—v.—

PAUL A. MCGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant.

Before: Hastie, Circuit Judge; Welsh, Senior District Judge; and Lord, District Judge.

OPINION—Filed December 1, 1959

By Hastie, Circuit Judge.

This case has been tried to a statutory three-judge court constituted as provided in Sections 2281 and 2284 of Title 28, United States Code. The plaintiff, Two Guys From Harrison-Allentown, Inc., seeks an injunction to prevent the District Attorney of Lehigh County from enforcing against its employees, and thus against its retail selling

business, the criminal sanctions of the Pennsylvania Sunday closing laws, sometimes called the Sunday "blue laws". Continuously since 1957 plaintiff has operated a large department store, employing some 300 persons, in a suburban area near the City of Allentown in Lehigh County. This store opens for business on Sunday as well as on the other six days of the week. About one-third of its business is done on Sunday.

The pleadings allege and the evidence establishes as a fact that, prior to a 1959 amendment of the "blue laws", the defendant had undertaken to enforce against the plaintiff's business and its employees the general provision of the Act of June 24, 1939, P.L. 872, §699.4, 18 P.S. §4699.4 that "whoever does or performs any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted) . . . [fol. 432] shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars . . ." It is also alleged and appears as a fact that the defendant is now threatening to enforce against the plaintiff's business and employees Section 699.10 as added to the Sunday closing law by the Act of August 10, 1959, P.L. 212, 18 P.S. §4699.10, which reads as follows:

> "Whoever engages on Sunday in the business of selling, or sells, or offers for sale on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business, or office furnishings, household, business, or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall upon conviction thereof in a summary proceeding for the first offense be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> "Each separate sale or offer to sell shall constitute a separate offense . . ."

idence does not show and the court does not find any present or continuing threat to enforce against plaintiff's retail selling the above quoted provision of the 1939 statute, although the defendant has expressed the legal view that both the old Section 699.4 and the new Section 699.10 apply to the situation of the plaintiff.

In these circumstances a question arises at the outset which affects the scope of proper present inquiry. Since the 1959 amendment has made the retail sale of specific categories of merchandise on Sunday a wrong punishable by a fine of one hundred dollars, does the sale of such merchandise continue to be punishable by a fine of four dollars under the older general prohibition of "worldly employment or business on Sunday"?

The 1959 enactment says nothing about the earlier general prohibition althougn it was enacted as an amendatory addition to Section 699 of the Penal Code in which the earlier prohibition appears. We think it can reasonably be argued that the new section supersedes the older one insofar as the latter covered in generality activities now [fol. 433] specifically dealt with and more severely punished in the amendatory enactment. *Cf. Commonwealth* v. *Brown*, 1943, 346 Pa. 192, 29 A. 2d 793; *Commonwealth* v. *Gross*, 1941, 145 Pa. Sup. 92, 21 A. 2d 238. In any event, here is a substantial unsettled question concerning the construction of the questioned state legislation. When the Pennsylvania courts decide this question they may well resolve it by an interpretation which will relieve the plaintiff and those associated with it of any punitive action under the 1939 statute.

In such a situation it is our duty to refrain from passing upon the constitutionality of the 1939 statute until the state courts have made clear whether it applies at all to the plaintiff since the 1959 amendment. *Harrison* v. *N.A.A.C.P.*, 1959, 360 U.S. 167; *Spector Motor Service* v. *McLaughlin*, 1944, 323 U.S. 101; *Railroad Commission* v. *Pullman Co.*, 1941, 312 U.S. 496. Even if the statute were clear, a court of the United States should, as a matter of policy to minimize interference with state action, refuse gratuitously to pass on the constitutionality of a provision of a state law when the plaintiff cannot show present urgent need for

federal intervention to prevent actual or imminently threatened deprivation of constitutional right. Plaintiff is in no such jeopardy now under the 1939 statute. In these circumstances we think it inappropriate to pass upon the constitutionality of the 1939 statute at this time or even, as was done in the cases cited above, to hold the case *sub judice* pending an interpretative state ruling. It is enough to say that our disposition of the present case shall not bar future resort to this court by the plaintiff if and when the state courts shall authoritatively decide that the 1939 statute still applies to selling which is covered by the 1959 amendment, and if and when plaintiff's business shall be jeopardized by a present threat of prosecution under the 1939 statute. The present adjudication will concern the 1959 amendment only.

Plaintiff attacks the Pennsylvania legislation commanding the cessation of certain worldly activity on Sunday as state action promoting "an establishment of religion" con- [fol. 434] trary to the prohibition of the First Amendment, as made applicable to the states by the Fourteenth Amendment. The argument is that this required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ. There is testimony which establishes as a fact in this record that this view of the religious significance of enforced Sunday work stoppage is sincerely held by many persons whose religion does not recognize the divinity or resurrection of Jesus of Nazareth or the sacredness of Sunday as the "Lord's day".

At the outset we consider a contention that this First Amendment argument has been foreclosed by authoritative determinations of the constitutionality of Sunday laws essentially similar to the Pennsylvania statute. At the turn of the century, before the Supreme Court had ruled that the First Amendment guarantees are enforceable through the Fourteenth Amendment against the states,[1] Sunday

[1] The ruling as to freedom of religion was first made in 1940 in *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, although first foreshadowed fifteen years earlier. *Gitlow* v. *New York*, 1925, 268 U.S. 652.

"blue laws" were upheld in two familiar decisions of the Court: *Hennington* v. *Georgia*, 1896, 163 U.S. 299; *Petit* v. *Minnesota*, 1900, 177 U.S. 164.[2] If these stood alone their present authority would be questionable in the light of the development of constitutional concepts during this century. But more recently a new test of the constitutionality of Sunday legislation was sought in an appeal to the Supreme Court from a conviction under the New York Sunday laws. *Friedman* v. *New York*, 1951, 341 U.S. 907. In the jurisdictional statement filed in the Supreme Court in support of that appeal the appellant said: "The question to be resolved is an important one: Are *Hennington* v. *Georgia* and *Petit* v. *Minnesota* still law in view of the *Everson* and *McCollum* decisions"?[3] Accordingly, it is appropriate that we examine that case carefully.

[fol. 435] The defendants in the *Friedman* case, who were Orthodox Jews, had been convicted of the retail selling of kosher meat on Sunday in violation of the New York prohibition against "all manner of public selling [except for many miscellaneous exemptions] . . . upon Sunday . . ." 39 N.Y. Consol. Laws, McKinney, 1944, §2147. The defense was carefully planned and organized under the direction of Leo Pfeffer, Esquire, a distinguished advocate and legal writer who had specialized in the field of religious liberty. Before the Supreme Court the appellant's very explicit statement of "Questions Presented" read in part as follows:

> "1. Whether the New York Sabbath Law (Article 192 of the New York Penal Law) is a law respecting an establishment of religion and is, therefore, invalid in its entirety under the First Amendment to the United States Constitution which is made applicable to the States by the Fourteenth Amendment.

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[2] See also the earlier dictum in *Soon Hing* v. *Crowley*, 1885, 113 U.S. 703, 710: "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

[3] Pfeffer's, CHURCH, STATE, AND FREEDOM, 1953, discusses Sunday laws in general and the *Friedman* case in detail at pages 227-241.

"2. Whether the New York Sabbath Law is constitutionally invalid as violative of the freedom of religion provision of the United States Constitution, because it fails to exempt from its operations persons whose religious convictions compel them to observe a day other than Sunday as their holy day of rest.

"3. Whether the New York Sabbath Law by reason of its 'crazy quilt' pattern of inclusions and exclusions is arbitrary and discriminatory and therefore violative of the 'equal protection of the law' and 'due process' provisions of the United States Constitution."

Of course these points were appropriately elaborated. Moreover, they had been raised at trial and had been considered and decided against the defendants by the highest court of New York. *People* v. *Friedman*, 1950, 302 N.Y. 75, 96 N.E. 2d 184. Indeed, Mr. Pfeffer points out in his book, and his submission must have made it plain to the Supreme Court, that this was essentially a test case to determine the vitality of the doctrine of the *Hennington* and *Petit* cases in the light of contemporary understanding of the reach of the First and Fourteenth Amendments. There can be no question but that the Supreme Court was plainly urged to find in the New York law the very constitutional infirmities we are now asked to find in the Pennsylvania law. Yet, without permitting oral argument the Court disposed of the case [fol. 436] in a per curiam opinion dismissing the appeal and saying merely "The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question." 341 U.S. 907. In these circumstances the *Friedman* case seems to mean that in the Supreme Court's view such legislation as the New York law is so clearly invulnerable to First and Fourteenth Amendment attack that it would not even be useful to permit further argument of the matter.[4]

[4] As early as 1902 the Supreme Court recognized the stare decisis effect of its per curiam disposition of cases properly appealed to it. *Fidelity & Deposit Co.* v. *United States*, 1902, 187 U.S. 315, 319. In more recent times this point has become important in the administration of the Court's rules and procedure which require that an appeal of right from a state court be supported by a jurisdictional

In effect, the Court was content to leave as the law of the land its old reasoning that "the legislature having . . . power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed. . . ." See *Hennington* v. *Georgia*, *supra*, at 304.

As an inferior court asked to hold unconstitutional the Pennsylvania laws prohibiting certain Sunday retail selling, we can escape from the obligation to apply the ruling in the *Friedman* case only if the Pennsylvania law is so significantly different from the New York law that a different result can be reached and justified without departing from the legal view for which the *Friedman* case stands.

[fol. 437] It has been suggested that the New York law differs significantly from the Pennsylvania law in two respects. First, the aim to protect the Christian Sabbath from profanation is said to be much plainer in Pennsylvania than in New York. In this connection, the text of the laws, their history and their judicial interpretation all are relevant. The basic Sunday "blue laws" of Pennsylvania, New York and many other states today are derived from colonial and early state statutes which, in turn, had been derived from

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statement, stating "the reasons why the questions presented are so substantial as to require plenary consideration . . ." Rule 15, par. 1(e), 346 U.S. 962. If that showing is insufficient or unpersuasive a per curiam dismissal for want of a substantial federal question or a summary affirmance of the judgment below follows. Unless such a dismissal is grounded in some procedural or technical insufficiency of appellant's presentation, its meaning seems to be that the disposition of the federal question by the state court was clearly right. In essence, such a per curiam is likely to be a particularly emphatic ruling on the merits of the question. The Court itself has explicitly recognized such summary rulings as authoritative precedents. *Baskin* v. *Industrial Accident Commission*, 1949, 338 U.S. 854; *North Coast Transportation Co.* v. *United States*, 1944, 323 U.S. 668. See also the statement of Mr. Justice Brennan, concurring in *Eaton* v. *Price*, 1959, 360 U.S. 246, 247, that, "votes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . ."

British laws designed to require observance and to prevent profanation of the Christian Sabbath. A hundred years before the American revolution an English statute prohibited any person from engaging in "worldly labor or business or work of the ordinary calling on the Lord's Day, works of necessity and charity excepted". 1676, 29 Car. II, C. 7. The colonial theocracies, among them both New York and Pennsylvania, adopted markedly similar legislation which they reenacted after they became states of the United States of America.[3] The basic Pennsylvania statute as it has come down to us in Section 699.4 of the codification of 1939, with its prohibition of "worldly employment or business . . . on the Lord's Day", has already been set out. The New York statute, 39 N.Y. Consol. Laws, McKinney, 1944, §2140 begins with this declaration:

> "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

Pursuant to this declaration the statute prohibits, among other things, "all manner of public selling" except for miscellaneous exemptions. §2147. We think it cannot be seriously questioned that in their relation to the first day Sabbath as an institution of Christianity the New York and Pennsylvania statutes have a common background and were in original conception designed to the same end. Moreover, the involvement of religious considerations appears clearly on the face of the basic statute in both states. [fol. 438] Local judicial interpretation of the two statutes tells the same story. In the case of *People* v. *Dunford*, 1912, 207 N.Y. 17, 20, 100 N.E. 433, the Court of Appeals declared:

> "That the legislature has the authority to enact laws regulating the observance of the Sabbath day and to prevent its desecration is not, and cannot well be, dis-

[3] See the summary of the evolution of legislation against "Sabbath breaking" in New York from colonial times in the dissenting opinion of Judge McCarthy in *Crown Kosher Super Market* v. *Gallagher*, D.Mass. 1959, 176 F.Supp. 466, 477, 484.

pated. The day is set apart by the statute for repose and for religious observance; objects which pertain to the physical and moral well being of the community. As to the acts which should be prohibited, as disturbances, or profanations, of the Sabbath day, the legislature is the sole judge."

Similarly in *People* v. *Moses*, 1893, 140 N.Y. 214, 215, this language appears:

> "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being of the people, and the peace, quiet and good order of society, has authority to regulate its observance, and prevent its desecration by any appropriate legislation is unquestioned."

See also *People* v. *Zimmerman*, 1905, 95 N.Y.S. 136. Finally, in the *Friedman* case itself, the opinion of the New York Court of Appeals, which was submitted to the Supreme Court for review, explicitly recognized the religious origin of the New York statute. 302 N.Y. at 79, 96 N.E. 2d at 186.

We find nothing in the cases discussing the Pennsylvania legislation and its background which makes any plainer the religious considerations which underlie the adoption of the "blue laws" of that state and from time to time have been utilized to justify them. The historical religious connection is so clear in both state statutes as to be obvious and indisputable. It has been stressed that the Supreme Court of Pennsylvania in upholding the local statute has gone so far as to say that "Christianity is part of the common law of Pennsylvania". *Commonwealth* v. *American Baseball Club of Philadelphia*, 1927, 290 Pa. 136, 138 Atl. 497, 499. But a New York case, *People* v. *Ruggles*, 1811, 8 Johns 290, went just as far.

Thus, the Supreme Court in the *Friedman* case was faced with very substantial indicia of the statute's relation to religion, strikingly similar to those appellant urges upon us now. We can see no basis for reasoning that the Pennsylvania statute is unconstitutionally related to an estab-

[fol. 439] lishment of religion without bringing the New York statute under the same interdiction. Yet, the Supreme Court sustained the New York statute summarily. If the view of the establishment of religion question thus authoritatively established by the Supreme Court is to be changed it is for that Court, not an inferior court, to do so. Our conclusion that the *Friedman* case has broad and controlling significance on the issue of establishment of religion is contrary to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market* v. *Gallagher*, D. Mass. 1959, 176 F. Supp. 466. That opinion disposes of this problem of controlling authority in a brief footnote which is not elaborate enough to make the court's reasoning clear to us. It affords no useful critique of our own analysis which indicates that the *Friedman* precedent is controlling.

As a separate point the plaintiff urges that the 1959 amendment is a denial of equal protection of the laws in that it unreasonably singles out certain types of retail selling for mandatory Sunday closing under heavy penalty—a hundred dollar fine, and twice that on subsequent offenses—while many other kinds of commercial activity are either permitted on Sunday or, if prohibited, subjected only to a very small fine, in most cases only four dollars.

This line of argument against Sunday closing statutes, no less than the First Amendment argument, has a considerable history of Supreme Court adjudication. Indeed, essentially the same argument was made against another provision of the Pennsylvania "blue laws" in *Commonwealth* v. *Grochowiak*, 1957, 184 Pa. Super. 522, 136 A. 2d 145. The Pennsylvania courts considered and rejected any argument that closing Sunday movies under a fifty dollar penalty, while other worldly amusements and activities were permitted, or at least prohibited under the much smaller four dollar penalty, was arbitrary and unreasonable and a denial of equal protection of the laws. The case was taken to the Supreme Court where the appeal was dismissed for failure to present a substantial federal question. 358 U.S. 47. In *State* v. *Towery*, 1954, 239 N.C. 274, 79 S.E. 2d 513, [fol. 440] appeal dismissed 347 U.S. 925, a Sunday seller of general merchandise complained that a North Carolina

law prevented him from operating on Sunday yet allowed drug stores to remain open and to sell the same kinds of merchandise. The North Carolina courts sustained the statute and the Supreme Court dismissed the appeal. Similar summary dismissal has been the fate of other recent claims of arbitrary classification and unreasonable discrimination in the selection of certain businesses and activities for Sunday closing while others, said to be no less objectionable, remained unmolested. *State* v. *Kidd*, 1957, 167 Ohio St. 521, 150 N.E. 2d 413, appeal dismissed 358 U.S. 132; *Gundaker Central Motors* v. *Gassert*, 1956, 23 N.J. 71, 127 A. 2d 566, appeal dismissed 354 U.S. 933; *State* v. *McGee*, 1953, 237 N.C. 633, 75 S.E. 2d 783, appeal dismissed 346 U.S. 802. This point was also involved in the *Friedman* case, which has already been discussed in relation to the establishment of religion issue. Indeed, the Fourteenth Amendment argument of arbitrary classification seems to have been made as strongly there as was the First Amendment argument. See Pfeffer, CHURCH, STATE, AND FREEDOM, *supra*, 230-234, 239-240. The New York statute was attacked as a miscellany of pointless, irrational and discriminatory differentiations in the treatment of various Sunday commercial activities. But the Supreme Court was not persuaded that the contention had sufficient merit even to require full argument.

In larger context, cases arising under the Sunday closing laws are but a striking example of the continuing reluctance of the Supreme Court to interfere with even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations. *Cf. Williamson* v. *Lee Optical of Oklahoma, Inc.*, 1955, 348 U.S. 483; *Kotch* v. *Board of River Port Pilot Commissioners*, 1947, 330 U.S. 552; *Tigner* v. *Texas*, 1940, 310 U.S. 141. But *cf. Morey* v. *Doud*, 1957, 354 U.S. 457. While *Morey* v. *Doud* indicates that the Supreme Court will still strike down what it views as the most patently arbitrary of economic classifications we cannot ignore the fact [fol. 441] that no Sunday law has seemed to the Court to raise even a substantial question in this area.

Moreover, in the case of the 1959 amendment of the Pennsylvania law, the circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action. In the present record it appears and we find that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that of the plaintiff initiated and triggered new and rather large scale violations, and threats of others. It also appears in the testimony which is part of the legislative hearing on the bill which became the 1959 amendment of the Sunday closing law, that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute. It is probable that such considerations influenced the legislature's 1959 decision to make Sunday retail selling the subject of a new prohibitory enactment. In such circumstances we find it impossible to believe that the Supreme Court would treat this case as significantly different from those in which it has dismissed appeals for want of a substantial federal question.

Finally, it is argued that because the general prohibition in the 1939 statute against worldly activity on Sunday has for a long time not been enforced strictly or at all against many worldly Sunday activities, it is a denial of equal protection of the law to enforce the new 1959 prohibition against the Sunday retail sale of specified kinds of merchandise. On this point the evidence is clear and we find as a fact that in Lehigh County numerous commercial and recreational activities covered by the general prohibition of the 1939 statute have long been conducted openly on [fol. 442] Sunday, and continue, without molestation or direction to desist by the defendant or by any public officer. On the other hand, beginning in 1957 and thereafter the

defendant made substantial and frequent efforts by admonition and arrest to compel the Sunday closing of numerous retail stores, including plaintiff's store. This court temporarily restrained the enforcement of the 1959 statute against the plaintiff within a week after its enactment. Since that time enforcement of the "blue laws" in Lehigh County has been held in abeyance. In these circumstances, the court finds no sufficient basis for a finding as to the future pattern or procedure of enforcement of the new statute if and when judicial restraint shall be removed. The impracticability of such an anticipatory finding is made the more obvious by the fact, of which we take judicial notice, that the term of office of the defendant as District Attorney expires at the end of the calendar year 1959. Thus, on the present record we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities. Is this such a discrimination as denies equal protection of the laws?

It may well be a violation of public duty under state law for local public officers to ignore widespread violations of the 1939 law. But it does not follow that the enforcement of the 1959 statute denies the Sunday selling retailer due process of law. The controlling constitutional principle is that such selective or discriminatory behavior by administrative officers, though wrongful, is not a violation of the Constitution unless equivalent action by the state legislature would be unconstitutional. *Snowden* v. *Hughes*, 1943, 321 U.S. 1; *Owensboro Waterworks Co.* v. *Owensboro*, 1906, 200 U.S. 38. See also *Hayman* v. *Galeston*, 1927, 273 U.S. 414, 416. In the situation we now are considering the administrative failure to enforce the 1939 law against certain types of Sunday activity creates a constitutional problem only to the extent that a legislative exemption of these [fol. 443] activities from Sunday closing would do so. But we already have pointed out that the Supreme Court has repeatedly treated the fact that a Sunday closing law is a hodgepodge characterized by many and seemingly pointless exceptions and exemptions as insufficient to raise a

substantial federal question. A hodgepodge in enforcement has no greater constitutional significance.[6]

On the whole case, while the court has jurisdiction of the parties and of the subject matter under Sections 1343 and 2281 of Title 28 of the United States Code, the plaintiff has failed to show any violation of the First or the Fourteenth Amendment of the Constitution of the United States. Accordingly, plaintiff is not entitled to relief in this action.

The factual statements and legal conclusions stated in this opinion shall constitute the findings of fact and conclusions of law of the court. An order may be presented dissolving the temporary injunction heretofore entered in this case. A final order and decree may be presented denying plaintiff relief.

The foregoing opinion, which has been approved by Judge Lord, is to be filed, together with the separate opinion of Judge Welsh.

William H. Hastie, Circuit Judge.

[fol. 444]

WELSH, SENIOR DISTRICT JUDGE, CONCURRING IN PART AND DISSENTING IN PART

It had been my hope after discussing this deep and fundamental problem with my Associates, to arrive at a completely unanimous conclusion. But a conscientious conception of Judicial duty, whether completely warranted or not, requires me to express myself in my own way on this subject.

Let me say at the outset that this Court, individually and collectively, has sought to catch the spirit as well as the letter of the various arguments of all concerned. We are all in agreement on the original legislation including that of the Act of 1939. On this religious phase of the subject

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[6] In so ruling we in no way detract from the authority of the leading case of *Yick Wo* v. *Hopkins*, 1886, 118 U.S. 356, where the administrative discrimination practiced against Chinese entrepreneurs would have been no less invidious and constitutionally intolerable if directed by the legislature.

I can speak from personal experience. Having been born in the late seventies and having lived in an environment and atmosphere of reverence for the Sabbath until I reached my early manhood, I know whereof I speak. That legislation was the outgrowth of deep feelings of all but a microscopic minority. The framers of the Law had gone through a religious experience and a spiritual Renaissance that clearly set before them the evils of excessive worldly pleasures and an unbridled seeking and striving for worldly [fol. 445] riches. Their principal objective was to minimize the weakening of the spiritual life by too much worldly pleasures. Labor was secondary at that time, secondary, because of the simple habits and custom of the times. Most people did their own labor. There were very few employers having control over large numbers of men. And nearly all labor, such as it was, could be suspended for a day without confusion or without inconvenience to the community.

For over a hundred and fifty years the initial legislation has been on the Statute books. Times and customs have changed, due to the different conditions under which we live. To me it seems almost an entirely different world. It is but natural that great changes should bring about a clamor for modification or repeal of those inhibitions.

An appeal for relief has been made to the Courts. Is that the proper Tribunal? After a Statute has been on the books for a hundred and fifty years or more should the Judicial Branch of the Government strike it down or should the appeal for relief be made to the Legislative Branch? Or to the people direct? Having served for many years in both the Judicial and Legislative Branches of the Government I cannot conceive that the Courts have power to [fol. 446] make such a decision as we are asked to make in this case by the plaintiff. In expressing this conclusion I do not want to be understood as not recognizing the increased demand for a change. Sometimes the advocates of the change speak rather harshly of the framers of those laws without an understanding of the motives that prompted their enactment. Often those who resist the repeal of this legislation today, are not entirely unsympathetic with the proponents of repeal. They know that in

many respects the law has been a dead letter for many years. But countless thousands of fair minded Americans who truly love God and their neighbor, look upon these laws as something pointing to a spiritual ideal—unrealized it is true—but still an expression of a desire of a great Country and a great people to attain and reach for something higher than the flesh-pots of Egypt or the corroding gold of a Midas.

During the last half century they have seen the struggle against materialism become more and more fierce. They are now seeing mighty nations rising against each other with weapons of annihilation and destruction greater than Satan himself could devise. At home and abroad they see the misery inflicted, and their hearts are troubled. They still feel safer with a declaration of principle expressing hope for an ideal still on the books of this beloved Country. [fol. 447] And in this global struggle they just do not want to throw the life preservers overboard to lighten the ship.

That is the way I read the feeling of our people. I am moved to say this in the hope that if both groups can see and feel what is on both sides of this question it will lead to a better understanding and a charitable goodwill on the part of all of us.

For these reasons I concur with the majority opinion in dismissing plaintiff's attack on all legislation prior to 1959.

In construing the Act of 1959 there are other considerations involved. It is frankly admitted by the sponsors of the Act that there is nothing of a religious character or element in the legislation. One can therefore fairly ask, why then should it be tacked on to an Act that was conceived and cradled in religiosity, if not in religion? The amending Act actually is one to regulate business and to deal with the competition among business men. Such far reaching effort to regulate the private lives of others should be bottomed on a firm Constitutional foundation, and the need, the necessity, and the evil to be controlled, fully met. We ask: Is it based on public health, public security, public morals, sanitation, water supply, education, [fol. 448] or any of the factors that would, standing by themselves be admittedly a basis for the power of the legislature to enact.

I do not want to go over the ground so thoroughly covered by my Associates but I do not find that the legislation has met the test on any of these requirements. We all admit that under our form of Government there are things that the legislature cannot do. The fundamental rights of the people have never been at the unrestricted mercy of a possible unreasonable and arbitrary legislature. *Morey* v. *Doud*, 354 U.S. 457. And in determining whether or not the legislature has kept within the legitimate bounds it is proper for the Courts in construing legislative action to ask these very pertinent questions as stated above.

It is also the duty of the Court to take into consideration the various facts that mark the introduction of the legislation and the events leading up to such introduction. I do not think anyone will seriously argue that there is such a rising tide of spiritual interest in Sunday's observance as to constitute a clamor for more stringent laws to insure the sanctity of the Christian Sabbath. The trend has been quite the reverse. Therefore, why this sudden eruption of Sabbath interest? All the facts leading up to the introduction of this Statute appear in the record and without [fol. 449] desiring to be critical they are not particularly wholesome or praiseworthy. (This is no reflection on the County Officials.) High pressured salesmanship, outstanding organizing ability, a fantastic list of prohibited activity, indicate that a single target was the objective and a single purpose to regulate business competition. In addition it was enacted a few months before a highly important State election when members of the legislature from various parts of the State were put to undue and unreasonable pressure to vote for this legislation, that they would not think of supporting if it was not connected with the Sunday closing. The proponents of the legislation admit this was a helpful feature in getting it passed.

If it is conceded that this legislation is within the power of the legislature to enact, then I cannot conceive of any future legislation that cannot also be passed. We know that far-sighted men are considering the advisability of the four day working week, due to automation and the fear of unemployment. If this Act lies within the power of the

legislature to enact, it will be establishing a precedent for drastic curtailment of the right to work in the future. [fol. 450] It is not like the daylight saving legislation, couched in the language of a recommendation or request, but in the language of a command subject to drastic penalty for violation.

This view is entirely too far to the left for me to say that the legislative branch has any such power without a specific grant of authority from the people. I would strike it down.

Geo. A. Welsh

[fol. 451]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

[Title omitted]

Present: Hastie, Circuit Judge, Welsh, Senior District Judge and Lord, District Judge.

SUPPLEMENTARY FINDINGS OF FACT—Filed December 7, 1959

Pursuant to the request of plaintiff the court makes the following findings of fact in addition to those already made and stated in the course of the opinion of the court:

1. Sunday is a day designated for religious services and observances by Christians, with the exception of Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day.

3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of worldly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house

after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum. Act of July 2, 1935, P. L. 599, 4 Purd. Stat. §§59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if [fol. 452] the voters of the municipality so vote by referendum, Act of April 25, 1933, P. L. 74, 4 Purd. Stat. §§81-77; to stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 Purd. Stat. §§121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 Purd. Stat. §§151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 Purd. Stat. §§181-185, provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, §1, as amended, 30 Purd. Stat. §265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, §702, as amended, 34 Purd. Stat. §1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, §406, as amended, 47 Purd. Stat. §4-406. (pp. 71-72.)

4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 Purd. Stat. §4651, 4 Purd. Stat. §82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 Purd. Stat. §§152, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the First Sunday and $200 thereafter, 4 Purd. Stat. §4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner, it is $100 for each sale at retail, [fol. 453] but only $4.00 at wholesale. Sale of slip covers for automobile seats all day Sunday entails a $4.00 fine;

the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter, and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

5. The Commonwealth of Pennsylvania has enacted a pattern of economic laws under the police power regulating hours of work, which operates completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, §3, as amended, 43 *Purd. Stat.* §103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended, 43 *Purd. Stat.* §46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, §1, 43 *Purd. Stat.* §361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159 §1, 43 *Purd. Stat.* §481 (employees of motion picture theaters must be given one day of rest per week).

6. The enforcement of the Sunday laws against plaintiff's employees, as threatened by defendant, will cause them not [fol. 454] to work on Sundays. This will require plaintiff to close its store on Sunday, which is likely to render its entire operation unprofitable.

7. Unless enjoined, defendant will enforce the 1959 statute against plaintiff's employees, thereby causing plaintiff to suffer irreparable harm.

William H. Hastie, Circuit Judge; George A. Welsh, Senior District Judge; John W. Lord, District Judge.

[fol. 455]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

MOTION FOR REARGUMENT, FOR AMENDMENT OF THE OPINION, FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FOR CONTINUATION OF INJUNCTION UNDER F.R.C.P. 62(c)—Filed December 3, 1959

Plaintiff, by its attorneys, respectfully moves the Court for Reargument, for Amendment of its opinion, and for additional findings of fact and conclusions of law, all with regard to the opinion, findings and conclusions filed in the above-captioned matter December 1, 1959, and for continuation of the Temporary Restraining Orders. In support thereof, plaintiff assigns the following reasons:

1. The Court erred in denying the claim for relief against discriminatory enforcement of the Sunday Laws by defendant, in view of the decision of the United States Court of Appeals in this matter at 266 F. 2d 427, 432, where the Court of Appeals stated as follows:

> "... The three-judge court, when constituted, will possess the jurisdiction to decide whether a substantial federal question as to the constitutionality of the Blue Laws is presented and, if it should decide that issue in the affirmative, also will have the power to decide if the Blue Laws have been applied discriminatorily [fol. 456] by the defendant. Louisville & Nash. R. Co. v. Garrett, 1913, 231 U.S. 298, 303-304, 34 S.Ct. 48; 58 L.Ed. 229; Osage Tribe of Indians v. Ickes, D.C. D.C. 1942, 45 F.Supp. 179, 183-185, affirmed 77 U.S. App. D.C. 114, 133 F.2d 47; Firemen's Ins. Co. of Newark, N.J. v. Beha, D.C.S.D.N.Y. 1928, 30 F.2d 539, 540, affirmed sub nom. Firemen's Ins. Co. of Newark, N.J. v. Conway, 1928, 278 U.S. 580, 49 S.Ct. 184, 73 L.Ed. 517.

"If the three-judge court, when constituted, should reach the conclusion that no substantial federal question as to the constitutionality of the Blue Laws is raised it may then resolve itself into a court of one judge who may determine whether the Blue Laws have been discriminatorily applied by the defendant. Gully v. Interstate Natural Gas Co., 1934, 292 U.S. 16, 18-19, 54 S.Ct. 565, 78 L.Ed. 1088; Andrew G. Nelson, Inc. v. Jessup, D.C.S.D.Ind. 1955, 134 F. Supp. 218, 221; Farmers' Gin Co. v. Hayes, D.C.W.D.Okl. 1943, 54 F.Supp. 43, 46-47."

This decision of the Court of Appeals is both a binding precedent upon this Court and the rule of this case.

The adherence to this rule is of substantial importance in these proceedings because an appeal from a court of one judge is to be taken to the Court of Appeals, whereas an appeal from the decision of the three-judge court is to be taken to the Supreme Court of the United States.

[fol. 457] 2. The Court erred in refusing to adjudicate the constitutional problems arising under the 1939 statute (Op. pp. 2-3), since many items which plaintiff sells are not covered by the 1959 Act, including auto supplies, sporting goods and photographic supplies, among others. Notes of Testimony at Preliminary Injunction Hearing of September 11, 1959, page 34*, incorporated into the record of the final hearing by reference (N.T. 7).

3. The Court erred in dismissing the complaint with regard to the 1939 Act pending determination by the state court. Under *Doud* v. *Hodge*, 350 U.S. 485, 487 (1956) and the decisions cited by this Court at page 3 of its opinion, particularly *Harrison* v. *NAACP*, 360 U.S. 167, the appropriate procedure is for the Court of the United States to retain jurisdiction, and either to obtain the consent of the state officials to refrain from prosecution as in the *Harrison* case, or in the alternative, to issue such restraining order as may be appropriate to protect the plaintiff from irreparable harm pending the decision.

4. The Court erred in deciding that *Friedman* v. *New York*, 341 U.S. 907, was a binding precedent here with regard to the issue of establishment of religion in view of the following findings of fact in this case, there being no such finding in the *Friedman* case (Op. p. 4):

> ". . . The argument is that this required cessation of business on Sunday is an enforced expression of respect for and acknowledgement of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ. There is testimony which establishes as a fact in this record that this view of the religious sig- [fol. 458] nificance of enforced Sunday work stoppage is sincerely held by many persons whose religion does not recognize the divinity or resurrection of Jesus of Nazareth or the sacredness of Sunday as the 'Lord's day'."

In the *Friedman* case, the Appellate Court stated only that the Sunday Laws there in issue may be said to have had a religious origin, but had become day of rest statutes since 1881. The transcript of the Supreme Court record shows that there was no evidence there and no finding of fact that enforced Sunday work stoppage has present religious significance. Indeed, the New York Court of Quarter Sessions and the Appellate Division did not even file opinions and the Court of Appeals filed a 2½ page per curiam opinion.

5. The Court has failed to rule upon plaintiff's requests for findings of fact and conclusions of law, many of which are not covered by the statement of facts or the conclusions of law in the opinion.

6. Plaintiff intends to file in this Court, within five days of the filing of a final order dismissing its complaint as to the issue of the constitutionality of the Acts, a notice of appeal to the Supreme Court of the United States with regard to such issues, and within fifteen days thereafter, a jurisdictional statement.

7. An appeal has been perfected in the Supreme Court of the United States by the filing of a jurisdictional state-

ment on November 17, 1959 in *Crown Kosher Super Market v. Gallagher*, 176 F. Supp. 466, a decision which, as this Court has stated, is contrary to its view here, thus raising a conflict between Courts of two Circuits.

8. Federal Rule of Civil Procedure 62(c) provides:

[fol. 459] "Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

9. That irreparable harm will be sustained by plaintiff if the injunction is not continued is not controverted. The Court found such irreparable harm by its Order filed September 11, 1959. The Commonwealth concedes the same fact by its Request for Finding of Fact No. 6, as follows: "Plaintiff's Sunday operations are vital to its existence, its ability to make a profit being wholly dependent on Sunday sales and its overhead being disproportionately defrayed by the addition of its Sunday volume."

Harold E. Kohn, William T. Coleman, Jr., Louis E. Levinthal, Morris Efron, Oscar Brown, By Harold E. Kohn, Attorneys for Plaintiff.

Of Counsel: Harry A. Kalish, Dilworth, Paxson, Kalish, Kohn & Dilks, 2635 Fidelity-Philadelphia Trust Building, Philadelphia 9, Pennsylvania.

[fol. 460]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

[Title omitted]

Present: Hastie, Circuit Judge; Welsh, Senior District Judge; and Lord, District Judge.

ORDER DENYING MOTION—December 7, 1959

The court having fully considered plaintiff's Motion for Reargument, For Amendment of the Opinion, For Additional Findings of Fact and Conclusions of Law and For Continuation of Injunction Under F. R. C. P. 62 (c); and the court not being persuaded that plaintiff is entitled to any of the types of relief sought in this motion except additional findings of fact; it is this 7th day of December, 1959;

ORDERED that, except for the making of additional findings of fact which have this day been filed herein, the aforesaid motion of plaintiff for reargument and other relief be and it is hereby denied.

William H. Hastie, Circuit Judge; John W. Lord, District Judge.

I dissent:

George A. Welsh, Senior District Judge.

[fol. 461]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

[Title omitted]

Present: Hastie, Circuit Judge; Welsh, Senior District Judge; and Lord, District Judge.

ORDER VACATING TEMPORARY INJUNCTIONS—December 7, 1959

And now, this 7th day of December, 1959, the above captioned proceeding having been heard and determined by this court, the orders heretofore entered on November 22, 1958, and September 11, 1959, temporarily restraining defendant from arresting or threatening to arrest any employee of plaintiff for violating the Pennsylvania Act of June 24, 1939, P. L. 872, Section 699.4, 18 P. S. Section 4699.4, or the Pennsylvania Act of August 10, 1959 (Act No. 212), adding Section 699.10 to the Act of June 24, 1939, P. L. 872, should be and hereby are dissolved.

William H. Hastie, Circuit Judge; John W. Lord, District Judge.

I dissent

George A. Welsh, Senior District Judge.

[fol. 462]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

[Title omitted]

FINAL ORDER—December 7, 1959

And now, this 7th day of December, 1959, the above-captioned civil action having come before the court as provided in 28 U. S. C. Sections 2281 and 2284 and the court having filed its opinion and having determined that plaintiff is not entitled to any relief, it is hereby ordered, ad-

judged and decreed that plaintiff's prayer for a permanent injunction should be and hereby is denied and that plaintiff's complaint should be and hereby is dismissed.

William H. Hastie, Circuit Judge; John W. Lord, District Judge.

I dissent.

George A. Welsh, Senior District Judge.

[fol. 463]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

ORDER CLARIFYING TEMPORARY RESTRAINING ORDER OF NOVEMBER 22, 1958—December 18, 1959

And now, to wit, this 18th day of December, 1959, upon consideration of the petition for clarifying order filed herein and after hearing, it is hereby ordered, adjudged and decreed as follows:

1. The temporary restraining order of this Court filed November 22, 1958 is deemed to be and is effective as to all arrests by defendant of plaintiff's employes for alleged violations of the Pennsylvania Sunday laws made for offenses allegedly committed during the period November 25, 1958 to March 25, 1959.

2. All prosecutions pursuant to said arrests before Justices of the Peace in Lehigh County, as set forth in Exhibit C to the petition shall be terminated, and no fines or costs imposed against plaintiff's employes and all bonds posted in such proceedings shall forthwith be cancelled.

Geo. A. Welsh, J.

[fol. 464]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25626

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 18, 1959

I. Notice is hereby given that Two Guys from Harrison-Allentown, Inc., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint, from the order vacating temporary injunctions and from the order denying motion for reargument, for amendment of the Opinion, for additional findings of fact and conclusions of law, and for continuation of the injunction under F.R.C.P. 62(c), all of which orders were entered by a Three-Judge Court on December 7, 1959.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The Clerk is requested to prepare a transcript of the Record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript all of the pleadings, orders, briefs and other papers filed in this case, as well as the Notes of Testimony taken at the hearing on September 11, 1959, and October 13, 1959 and October 14, 1959, together with all the exhibits [fol. 465] admitted into evidence or marked for identification and offered at those two sets of hearings.

III. The following questions are presented by this Appeal:

A. Do the Pennsylvania Sunday Laws (the Act of June 24, 1939, P.L. 872, §699.4, 18 P.S. §4699.4, and the Amendatory Act of August 10, 1959, P.L. 212, 18 P.S. §4699.10), which laws the court below found as a fact to be religious laws, enacted to force all persons to observe the weekly resurrection of Jesus Christ, and had "near whimsical clas-

sifications", violate the equal protection and due process clauses of the federal Constitution because:

1. said laws constitute laws establishing religion or laws which prefer one religion over certain other religions or laws which discriminate in favor of certain religions against other religions;

2. said laws arbitrarily and unreasonably include certain activities within the statutory prohibition and likewise exclude certain other activities of the same or similar nature and such laws have no rational basis for the varying penalties for violation of these and other laws dealing with activities on Sunday;

3. said laws are based upon no reasonable basis for interfering with plaintiff's right to conduct a lawful and useful business?

B. Did the wilful, arbitrary and discriminatory enforcement of said Pennsylvania Sunday Laws and substantially against only plaintiff for personal motives by the defendant District Attorney and the ignoring of open, flagrant [fol. 466] and repeated violation of said laws by other persons in the same county violate rights guaranteed th plaintiff by the Fourteenth Amendment to the Federal Constitution and by the Federal Civil Rights Act?

C. Did the Three-Judge District Court err in not resolving itself into a one-judge court of the original hearing judge to pass upon the question of discriminatory enforcement once it had found that the attack on the constitutionality of the Pennsylvania statutes involved in its opinion no substantial federal question as to the constitutionality of said state statutes?

D. Did the court below err in refusing to pass upon the constitutionality of the Pennsylvania Act of June 24, 1939, P.L. 872, 18 P.S. §4699.4?

E. Did the court below err in refusing to retain jurisdiction with respect to the constitutionality of the Pennsylvania Act of June 24, 1939, P.L. 872, 18 P.S. §4699.4 pending a determination in the state court of the coverage of said Act?

F. Is the appeal from the question of discriminatory enforcement directly to this Court under 28 U.S.C. 1253, or should it be to the Court of Appeals for the Third Circuit

Respectfully submitted,

Harold E. Kohn, William T. Coleman, Jr., Louis E. Levinthal, Attorneys for Appellant, 2635 Fidelity Philadelphia Trust Building, Philadelphia 9, Pa.

Of Counsel:

Dilworth, Paxson, Kalish, Kohn & Dilks, 2635 Fidelity Philadelphia Trust Building, Philadelphia 9, Pa.
Morris Efron, 502 Turner Street, Allentown, Pa.
Oscar Brown, 1700 Bankers Securities Building, Philadelphia 7, Pa.

Date: December 17, 1959

[fol. 467] Proof of Service (omitted in printing).

[fol. 468]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,096

TWO GUYS FROM HARRISON-ALLENTOWN, INC., Appellant,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania.
PENNSYLVANIA RETAILERS' ASSOCIATION, Amicus Curiae.

Appeal From the United States District Court for the Eastern District of Pennsylvania.

Heard on Petition for Temporary Restraining Order or Other Relief, December 9, 1959

Before Goodrich and Staley, Circuit Judges.

OPINION OF THE COURT—Filed December 23, 1959

Per Curiam

The plaintiffs in this case have taken the position that they may appeal to the Supreme Court of the United States from an adverse decision by a three-judge court on the issue of the constitutionality of the statute and simultaneously appeal to the Court of Appeals on the issue of discriminatory enforcement of the statute. We think there is no basis for the allowance of a split appeal in this fashion. Therefore, we dismiss the appeal to this Court for want of jurisdiction. See 28 U.S.C.A. §§ 1253, 1291.

[fol. 469] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

MOTION FOR SUBSTITUTION OF ADDITIONAL DEFENDANT—Filed January 8, 1960

Plaintiff respectfully requests the Court to order the substitution of George J. Joseph, District Attorney of Lehigh County, Pennsylvania, as an additional defendant in the above-captioned proceedings, for the reasons set forth below:

1. The term of defendant Paul A. McGinley as District Attorney of the County of Lehigh, Pennsylvania, expired on or before January 4, 1960.

2. On January 4, 1960, George J. Joseph, his successor in office, was duly qualified and took office as District Attorney of Lehigh County, Pennsylvania.

3. Said George J. Joseph is obliged by law and will, unless restrained, perform the duties of District Attorney with regard to the prosecution of persons arrested for violating the Pennsylvania Sunday Laws, including the Act of 1794 as codified in 1939 and the Act of August 10, 1959. Plaintiff has no reason to believe and, therefore, does not aver that said George J. Joseph will discriminatorily enforce such laws as did his predecessor, defendant Paul A. McGinley, as averred in paragraph 5 of the amended complaint.

[fol. 470] 4. Substitution of the said George J. Joseph as an additional defendant with regard to the allegations of paragraph 6 of the amended complaint relating to the unconstitutionality of the said Sunday Laws upon the grounds of unreasonable discrimination and the establishment of religion is necessary.

Respectfully submitted,

Harold E. Kohn, William T. Coleman, Jr., Louis E. Levinthal, Morris Efron, Oscar Brown, Attorneys for Plaintiff.

Of Counsel:

Harry A. Kalish, Dilworth, Paxson, Kalish, Kohn & Dilks, 2635 Fidelity-Phila. Trust Building, Philadelphia 9, Pennsylvania.

[Handwritten notation]

Counsel for defendant and the substituted defendant have been notified by counsel for plaintiff of the intention to file this motion today Jan. 8, 1960, and have no objection to the entry of the order prayed.

Harold E. Kohn

[fol.]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 25,626

[Title omitted]

Present: Hastie, Circuit Judge; Ganey, Chief District Judge and Egan, District Judge.

ORDER SUBSTITUTING ADDITIONAL DEFENDANT—
January 8, 1960

And Now, to wit, this 8th day of January, 1960, upon consideration of the within motion for substitution and after hearing, it is hereby ordered, adjudged and decreed that the said George J. Joseph, District Attorney of Lehigh County, be substituted as an additional defendant with respect to the issues of the constitutionality of the Pennsylvania Sunday Law of 1794, as codified in 1939, and the Act of August 10, 1959.

By the Court: William Hastie, J.

[fol. 472]

SUPREME COURT OF THE UNITED STATES

No. 699, October Term, 1959

TWO GUYS FROM HARRISON-ALLENTOWN, INC., Appellant,

vs.

PAUL A. MCGINLEY, District Attorney, County of Lehigh, Pennsylvania, et al.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

ORDER NOTING PROBABLE JURISDICTION—April 25, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary calendar and set for argument immediately following No. 438.

IN THE

Supreme Court of the United States

October Term, 1959.

No. ~~695~~ 36

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees.

On Appeal From the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 et seq.

JURISDICTIONAL STATEMENT.

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
LOUIS E. LEVINTHAL,
2635 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pa.,
MORRIS EFRON,
502 Turner Street,
Allentown, Pa.,

Attorneys for Appellant.

DILWORTH, PAXSON, KALISH, KOHN & DILKS,
OSCAR BROWN,
HARRY A. KALISH,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, DEFENDANT AND GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, SUBSTITUTED ADDITIONAL DEFENDANT,

Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. § 2281 *et seq.*

JURISDICTIONAL STATEMENT.

A.

Opinions Delivered in the Court Below.

The majority opinion of the three-judge court, filed on December 1, 1959 but not yet reported, is annexed hereto as Appendix A, *infra*. Appendix A also contains Senior District Judge Welsh's dissenting opinion beginning on

p. 16a, *et seq., infra.* On December 7, 1959 the three-judge court denied a timely petition for rehearing, but simultaneously filed supplemental findings of fact which are annexed hereto as Appendix B, *infra*, p. 20a, *et seq.*

An appeal to the Court of Appeals for the Third Circuit, solely with respect to the claim of discriminatory enforcement was filed and was dismissed for lack of jurisdiction on December 9, 1959. An opinion thereon was filed on December 23, 1959, a copy of which is annexed hereto as Appendix C, *infra*, p. 23a. Appellant is simultaneously herewith filing a petition for a writ of certiorari to review said dismissal.

An appeal to the Court of Appeals for the Third Circuit on an earlier phase of this case is reported at 266 F. 2d 427 (C. A. 3rd, 1959).

B.

Statement of the Grounds on Which Jurisdiction Is Invoked.

The final order from which appeal is taken is from the decision of the three-judge court entered on December 7, 1959, on which day rehearing was also denied. See Appendix D. The notice of appeal was filed December 18, 1959 in the District Court.

The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1253, 1291 and 2281 *et seq.*, the appeal being from a final order of a three-judge court which refused a permanent injunction and dissolved the temporary injunction on the ground that the state statutes attacked by appellant did not conflict with the Federal Constitution. *Query v. United States*, 316 U. S. 486, 490-91 (1942); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, No. 13,096 (C. A. 3rd, December 23, 1959) (Appendix C); see also *Lee v. Roseberry*, 200 F. 2d 155, 156 (C. A. 6th, 1952); *cf. Radio Corp. of America v. United States*, 341 U. S. 412 (1951).

C.

Statutes Involved.

The Pennsylvania statutes whose validity are involved are the basic Pennsylvania Sunday law which provides:

"Whoever does or performs **any worldly employment** or business whatsoever on the **Lord's Day, commonly called Sunday** (works of necessity and charity only excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.

"Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment for the use of sojourners, travellers or strangers, or to hinder waterman from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families on the **Lord's Day**, commonly called Sunday, nor to the delivery of milk or the necessaries of life, **before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day.**" Act of April 22, 1794, 3 Sm. L. 177, § 1, 18 **Purd. Stat.** § 4699.4 (bold face type supplied),

and the Amendatory Act of August 10, 1959 which provides:

"**Whoever** engages on **Sunday** in the business of selling, **or sells or offers for sale, on such day at retail,** clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hard-

ware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding **two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.**

"Each separate sale or offer to sell shall constitute a separate offense . . ." P. L. No. 212, 18 **Purd. Stat.** § 4699.10. (bold face type supplied)

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States including the equal protection and due process clauses of the latter Amendment.

D.

Questions Presented

The basic Pennsylvania Sunday Blue Law, the Act of April 22, 1794, 18 **Purd. Stat.** § 4699.4, prohibits all "worldly employment" except acts of necessity on the "Lord's Day (commonly called Sunday)" so that the citizens of Pennsylvania can "read the Scriptures" and attend "religious worship." *Sparhawk v. The Union Passenger Railway Co.*, 54 Pa. 401, 408-09, 423 (1867); *Commonwealth ex rel. v. American Baseball Club of Philadelphia*, 290 Pa. 136, 143 (1927). This Act was amended on August 10, 1959 so as to impose additional and heavier penalties on those who sold or offered to sell at retail certain enumerated merchandise on the Lord's Day. The court below made the following findings of fact:

(1) the Amendatory Act of August 10, 1959 was to force the cessation of work on Sunday in order to commemorate weekly the sectarian religious event and doctrine of the Resurrection of Jesus Christ, the same event and doctrine as are commemorated by the Christian Easter (4a, 20a);

(2) that such practice was offensive to those persons whose religious teachings were contrary to those which gave such religious significance to Sunday, including Seventh Day Adventists, Seventh Day Baptists, Jews and atheists (4a);

(3) that work on Sunday had no different effect on the health or welfare of appellant's employees or customers from work on any other day (20a);

(4) Pennsylvania has a separate and distinct pattern of economic laws regulating hours of work which operate completely independently of the Sunday Laws (22a);

(5) by legislative acts and court decisions many substantially similar activities are exempt from the Sunday Blue Law (20a), and

(6) many activities substantially similar to those engaged in by the appellant have been and will be permitted by law enforcement officers in Pennsylvania even though nominally prohibited by statutes and court decisions (44a).

The record also shows that for personal profit reasons appellee, District Attorney Paul A. McGinley, wilfully and discriminatorily enforced the law only against appellant and not against other similar businesses even though such discrimination was called to his attention and protested. The court below refrained from making requested findings on the issue of discrimination in administration on the ground that McGinley's term of office would shortly expire, but many prosecutions instituted by him still are pending.

The questions therefore presented are:

1. Does the Pennsylvania Act of August 10, 1959, in the light of the court findings referred to above, violate the Fourteenth Amendment to the Federal Constitution because:

(a) it is a law respecting the establishment of religion;

(b) it discriminates against certain religions and prefers one religion over other religious beliefs;

(c) there is no reasonable basis for the classification of prohibited and permitted activities contained in the Pennsylvania Act of August 10, 1959 and other Pennsylvania statutes and court decisions dealing with worldly activities in Pennsylvania on the Lord's Day;

(d) it imposes oppressive and discriminatory fines?

2. Did the wilful, arbitrary and discriminatory enforcement of the Pennsylvania Sunday Blue Law against appellant by appellee, District Attorney Paul A. McGinley, deprive appellant of rights guaranteed it by the Fourteenth Amendment to the Federal Constitution?

3. Did the court below err in refusing to pass upon the constitutionality of the Act of April 22, 1794, 18 **Purd. Stat.** § 4699.4, and dismissing that part of the complaint on the ground that a subsequent Pennsylvania court decision might make said statute inapplicable to appellant's employees, despite the fact that (a) there was a state court decision that said Act did apply to appellant's employees and (b) appellant sold many items not covered by the Act of August 10, 1959 but covered by the Act of April 22, 1794?

E.

Statement of the Case.

This appeal is from the final order of a three-judge court for the Eastern District of Pennsylvania which denied a permanent injunction and dissolved the Temporary Injunction, after upholding by a two to one vote the constitutionality of the Pennsylvania Sunday Blue Laws, including the Amendatory Act of August 10, 1959, P. L. 212, 18 **Purd. Stat.** § 4699.10.

Said court was convened pursuant to Sections 2281, *et seq.* of Title 28 U. S. C.

The court below expressly held that its decision was "contrary to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959)," p. 10a, *infra*, which case is now on direct appeal to this Court at Docket No. 532, October Term, 1959.

Appellant herein, Two Guys from Harrison-Allentown, Inc., operates a retail store in Whitehall Township, Lehigh County, Pennsylvania, employing 300 persons. The store is along the highway outside the City of Allentown, with a parking lot for several thousand cars and caters to the family shopping group out for a Sunday drive and interested in economy as against "fancy and expensive downtown store" services.

Appellant opened its store in Lehigh County at a cost of over $1,000,000 only after it had been told that no one ever had been prosecuted for selling on Sunday and being assured by the township officials that its operation was permissible (N. T. 91, 96-97).[1] After appellant was open for six months the appellee, Paul A. McGinley, then the District Attorney of Lehigh County, began to arrest appellant's employees for violations of the Act of April 22, 1794, 18 **Purd. Stat.** § 4699.4, the basic Pennsylvania Sunday Blue Law. These arrests and prosecutions continued every

1. The "N. T." references are to notes of testimony taken in the court below.

Sunday although other business activities were permitted by appellee McGinley without arrest.[2] A year later, in November, 1958, said appellee threatened to arrest appellant's employees for conspiracy, the penalty for which is a two year jail sentence and a $500 fine. 18 **Purd. Stat.** § 4302.

The appellant thereupon brought a bill in equity in the Federal Court for the Eastern District of Pennsylvania pursuant to 28 U. S. C. §§ 1331 and 1343, 42 U. S. C. §§ 1981 and 1983 and to 28 U. S. C. §§ 2281 and 2284. The bill in equity alleged that the Pennsylvania Sunday Law—the Act of April 22, 1794—was unconstitutional because: (a) it was a law respecting the establishment of religion; or (b) a law which prefers or places at an advantage one religion over others; (c) it denies equal protection since it was discriminatory; and (d) the appellee, Paul A. McGinley, was applying the law to appellant in a wilfully discriminatory manner. On complaint and affidavits the Court issued a temporary restraining order.

Since appellant was making an attack on the constitutionality of a state statute the matter was heard before a specially constituted three-judge court. See *Two Guys from Harrison-Allentown, Inc. v. Paul A. McGinley*, 266 F. 2d 427 (C. A. 3rd, 1959).

Immediately prior to the time for trial and after the filing of the Complaint, the Pennsylvania Legislature passed an amendatory act—the Act of August 10, 1959—which singled out for more severe penalty certain retail sales of particular merchandise sold by the appellant. The bill in equity was amended to include an attack on the constitutionality of this Act on the same grounds.

The court after hearing granted a preliminary injunction against enforcement of the Sunday Blue Laws against appellant after finding that "substantial and irreparable in-

2. The Record shows that appellee, Paul A. McGinley, discriminated against plaintiff's employees because he was improperly induced to do so by Max Hess, the President and owner of Hess' Department Store, appellant's principal business competitor (N. T. 178-79, 239a-41, 195, 254-55).

jury will be suffered by plaintiff [if the statutes are applied to it] because plaintiff will be required to discontinue the operation of its store on Sunday, the day of its largest sales volume." (Order dated September 11, 1959.)

The case was tried on the merits in October, 1959. The court found that appellee, Paul A. McGinley, had threatened to enforce the Act of August 10, 1959, P. L. 212, 18 **Purd. Stat.** § 4699.10, against appellant's employees, that he had in the past enforced the Act of April 22, 1794, 18 **Purd. Stat.** § 4699.4, against appellant's employees, that appellant had no adequate remedy at law and that appellant would "suffer irreparable harm." See Appendix A, *infra*, p. 2a and Appendix B, *infra*, p. 22a.

Certain findings also are relevant to the merits of the question of the constitutionality of the Act of August 10, 1959.

The court below found that the origin, purpose and effect of the Pennsylvania Sunday Laws, including the Act of August 10, 1959, were to force observation of the Christian Lord's Day and that there were many persons in Pennsylvania who were offended in their religious beliefs by the required cessation of business on Sunday since it is "an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ." Appendix A, *infra*, p. 4a.

The Court also made the following additional findings of fact:

"1. Sunday is a day designated for religious services and observances of Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

"2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the em-

ployees or customers of the store than does work on any other day.

"3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of worldly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of July 2, 1935, P. L. 599, 4 *Purd. Stat.* §§ 59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of April 25, 1933, P. L. 74, 4 *Purd. Stat.* §§ 81-77; to stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 *Purd. Stat.* §§ 121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 *Purd. Stat.* §§ 151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 *Purd. Stat.* §§ 181-185, provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, § 1, as amended, 30 *Purd. Stat.* § 265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, § 702, as amended, 34 *Purd. Stat.* § 1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, § 406, as amended, 47 *Purd. Stat.* § 4-406 (pp. 71-72).

"4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 *Purd. Stat.* § 4651, 4 *Purd. Stat.* § 82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 *Purd. Stat.* §§ 152, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the first Sunday and $200 thereafter, 4 *Purd Stat.* § 4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner it is $100 for each sale at retail, but only $4.00 at wholesale. Sale of slip covers for automobile seats all day Sunday entails a $4.00 fine; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter, and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

"5. The Commonwealth of Pennsylvania, has enacted a pattern of economic laws under the police power regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 *Purd. Stat.* § 103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, § 4, as amended, 43 *Purd. Stat.* § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 *Purd. Stat.* § 361 (bakery workers

cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 *Purd. Stat.* § 481 (employees of motion picture theaters must be given one day of rest per week)." Appendix B, *infra*, pp. 20a-22a.

The majority of the court, however, refused to declare the two Pennsylvania statutes under attack unconstitutional. With respect to the Act of August 10, 1959, it held that despite the clear proof of the religious origin, purpose and effect thereof, this Court's action in *Friedman v. New York*, 341 U. S. 907 (1951), wherein this Court dismissed an appeal with respect to a New York Sunday statute for "want of a substantial federal question," precluded an independent consideration of the constitutionality of such statute, since that decision had to be construed as a holding that any Sunday Blue Law even though religious in origin, purpose and effect, nevertheless does not violate the Fourteenth Amendment. With respect to the argument on the equal protection clause due to the unreasonable and discriminatory classification contained in the 1959 Act, the court, ignoring religious overtones of the statute, held that where the statute deals with economic matters this Court permits "even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations." Appendix A, *infra*, p. 12a.

The court below refrained from passing upon the claim that the appellee District Attorney, Paul A. McGinley, had wilfully and discriminatorily enforced Sunday Laws against the appellant. It conceded and found as a fact that there had been no enforcement prior to actions against the appellant. But it held that it would not make "an anticipatory finding" with respect to the future because the term of Paul A. McGinley as District Attorney would expire, according to the Court, on December 31, 1959. But it did admit that on the present record even after appellee's term

would end "we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities." Appendix A, *infra*, p. 14a.

It disposed of the constitutional problem thus presented, however, by the novel theory that any discrimination that could be carried out by the Legislature through a statute would be equally valid if carried out by the individual law enforcement officer by applying the statute against only certain businesses regardless of the motive for the discrimination on the part of the official. Appendix A, *infra*, p. 14a.

On the theory that a Pennsylvania court might hold that activities covered by the Act of August 10, 1959 were now exempt from the broader provisions of the Act of 1794, it refused to pass upon the constitutionality of the Act of 1794. It did this despite the fact that less than a year before the highest Pennsylvania court had held that appellant's employees *were* covered by the Act of 1794, *Commonwealth v. Bauder*, 188 Pa. Super. Ct. 424, 145 A. 2d 915 (1958), *allocatur refused*, 188 Pa. Super. Ct. xxviii, and appellee himself was still contending that he could arrest under the Act of 1794 (Appendix A, *infra*, p. 3a), and appellant sold many items covered only by the Act of 1794.

As stated above, the court entered a final order denying the prayer for final relief and dissolving the temporary restraining order previously in effect. On rehearing, the court, *inter alia*, refused to retain jurisdiction of the part of the case dealing with the Act of 1794 pending a state court determination.

Appellant attempted to appeal to the Court of Appeals solely from the part of the court's order that dealt with the question of discriminatory enforcement by appellee, Paul A. McGinley, but the Court of Appeals held that an appeal from any action of a three-judge court would have to be to this Court, even with respect to the part of the case which could have been heard originally by a single judge.

This Court on December 11, 1959, refused to reinstate the restraining order pending the Appeal.

After the expiration of the term of office of Paul A. McGinley, an order was entered permitting appellant to substitute George J. Joseph, the new District Attorney, as an additional defendant.

F.

The Federal Questions Are Substantial, Were Wrongly Decided Below, and Are of Great Public Importance.

I.

This is the first case where a court has made an explicit finding of fact that a particular state law complained of is religious in origin, purpose and effect and yet sustained the statute against a claim of unconstitutionality.[3] Such a result clearly conflicts with the decisions of this Court holding the First Amendment to the Federal Constitution is made applicable to states by the Fourteenth Amendment. See *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1948), which set up the test of prohibited state action in the religious field as follows:

> "Neither a state nor the federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion.

3. Recognized scholars from Blackstone to Chief Judge Magruder have recognized the religious nature and effect of Sunday Blue Laws. IV BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (9th Ed. 1783), Chapter 4, pp. 63-64; MARK, THE FAITH OF OUR FATHERS, p. 286; FISHER, HISTORY OF THE INSTITUTION OF THE SABBATH DAY, pp. 63-66; III STOKES, CHURCH AND STATE IN THE UNITED STATES, pp. 154-56, 157-58, 168-69; see also plaintiff's Brief in the court below, copies of which were filed with this Court on December 9, 1959 in support of its petition for an interim restraining order.

> No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

The decision in the case at bar also conflicts with the decision of the three-judge court of the District of Massachusetts which held unconstitutional the Massachusetts Sunday Law. *Crown Kosher Super Market of Massachusetts v. Gallagher*, 176 F. Supp. 466 (D. Mass., 1959), now on appeal to this Court at Docket No. 532, October Term, 1959. In that case the court said:

> "What Massachusetts has done in this statute is to furnish special protection to the dominant Christian sects which celebrate Sunday as the Lord's day, without furnishing such protection, in their religious observances, to those Christian sects and to Orthodox and Conservative Jews who observe Saturday as the Sabbath, and to the prejudice of the latter group.
>
> * * *
>
> "For reasons closely related to those just set forth, the objection is well taken that, in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of liberty, without due process of law, contrary to the Fourteenth Amendment." p. 475.

Also, Judges Goodrich and Hastie in *Bargaintown, U.S.A., Inc. v. Whitman*, United States District Court for the Middle District of Pennsylvania, Civil Action No. 6760,

a case dealing with the Pennsylvania Act of August 10, 1959, said:

> "If the question involved in this case came to us as one of first impression we would find great difficulty in upholding the constitutionality of the legislation in question."

Judge Hastie was also one of the majority below in this case.

Such doubt as to constitutionality certainly is not disposed of by a simple reference to this Court's single line order in *Friedman v. New York*, 341 U. S. 907 (1951).

The compulsory abstention from work on Sunday is a compulsory form of religious observance, like kneeling, covering or uncovering the head and other ceremonies or symbols. As this Court said in the flag salute case, *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 632-33, 642 (1943):

> "There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one

man's comfort and inspiration is another's jest and scorn."

* * *

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

The findings of the court below with respect to a separate statutory scheme for hours of work and the effect of Sunday work on the employees and customers, as well as Chief Judge Magruder's clear analysis of the day-of-rest argument in the *Crown Kosher* case, *supra* make it crystal clear that the question of Sunday Laws must be squarely met and disposed of by this Court. In *Friedman v. New York, supra*, there was no finding by the court below that the statute involved was religious in nature, purpose or effect. The same thing is true of the other Sunday law cases which this Court has refused to hear since 1950.

It would seem, in accordance with the procedure followed in *Brown v. Board of Education*, 394 U. S. 483 (1954), that this new finding of fact requires a reconsideration of the *Friedman* rule, just as the new finding of fact by the lower court in the *Brown* case required a reconsideration of the separate-but-equal doctrine. More basic in fact is that *Friedman, supra* is not here controlling. *Crown Kosher v. Gallagher, supra*.

The last full opinion by this Court on Sunday laws was in 1896 (*Hennington v. Georgia*, 163 U. S. 299, 304), the same year as *Plessey v. Ferguson*, 163 U. S. 537, and was a half century prior to the decision in *Murdock v. Pennsylvania*, 319 U. S. 105 (1943), which for the first time held that the religious protections of the First Amendment apply to state action, under the Fourteenth Amendment.

II.

As set out in findings of facts Nos. 3 and 4 of the court below, Appendix B, *infra*, pp. 20a-21a, the business and commercial activities permitted on Sunday and the varying fines for those prohibited afford no rational basis for distinction between those prohibited and those subject to stringent penalty. And the penalties are in some cases 200 times the amount collected on the sale.

In what manner does a sale at retail differ from a sale at wholesale justifying different Sunday treatment? If these are day-of-rest statutes, do not employees of wholesale establishments, factories and service establishments need a day of rest too? What is the distinction between commodities not listed in the Act of August 10, 1959 as against those contained therein?

Certainly such willy-nilly statutory distinctions do not comply with the constitutional requirement that "a statutory discrimination must be based on differences that are reasonably related to the **purpose of the Act** in which it is found." *Morey v. Doud*, 354 U. S. 457, 465 (1957); *Smith v. Cahoon*, 283 U. S. 553, 567 (1931); see also *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 406 (1928), wherein this Court said:

> ". . . classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situ-

ated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

If it be argued that the reason for the classifications and exemptions in the present Pennsylvania Sunday statutes is to keep pace with changing mores of proper deportment on Sunday, to permit those recreational activities which modern religion tolerates and to ban or condemn commercial and business activities which it disapproves of, —the so-called "continental Sunday"—such legislation would be seeking to achieve an unconstitutional purpose, namely to establish religion, albeit a more relaxed type of religion than the Puritan principles which the original Sunday laws were enacted to serve. It would be unconstitutional because of this end purpose. No other tenable or rational basis for the classification and discriminatory exemptions can be advanced.

Many State cases faced with statutory classification schemes less discriminatory than the Pennsylvania situation have held their Sunday laws unconstitutional as denial of equal protection of laws. See *e.g.*, *City of Mt. Vernon v. Julian*, 369 Ill. 447, 17 N. E. 2d 52 (1938); *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N. W. 2d 643 (1951); *Gronlund v. Salt Lake City*, 194 P. 2d 464 (Utah, 1948); *Allen v. Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1938); *Gaetano Bocci & Sons Co. v. Town of Lawndale*, 208 Calif. 720, 284 Pac. 654 (1930); *Deese v. City of Lodi*, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937); *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939 (1943); *Ex parte Hodges*, 65 Okla. Crim. 69, 83 P. 2d 201 (1938); *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952).

Once again the First Circuit's decision in *Crown Kosher Super Market of Massachusetts v. Gallagher*, 176 F. Supp. 466 (D. Mass., 1959), is directly opposite that of the decision in the case at bar. Moreover, even if the law were economic rather than religious, this Court has never held that merely because a law is economic in purpose a Legislature can engage in "whimsical classifications." In fact, this Court has repeatedly held that even with respect to economic legislation the classification must be reasonable and be based upon a difference between those activities included and those excluded. *Morey v. Doud*, 354 U. S. 457 (1957).

Appellant is engaged in a new type of merchandising which the public is very much in favor of. Obviously the existing downtown stores are using every method to throttle this unwelcome competition. As Senior Judge Welsh observed in his dissent, the downtown department stores seek to stifle the competition by reviving the religious laws which had fallen into disuse (18a-19a). Since this law affects the economic life of a large segment of a particular industry certainly this matter should be resolved by this Court.

III.

The decision of the court below affects adversely all those who do not believe in the resurrection of Christ on Sunday, including Jews, who are 3.04% of the population and Seventh Day Adventists and Baptists who are 1% of the population. It also affects adversely the 4% of the population that has no religious traditional affiliation or belief. The decision unfortunately represents the type of judicial approach to Sunday Law questions so ably described by Judge Voelker in *People's Appliance & Furniture, Inc. v. City of Flint*, Supreme Court of Michigan, Nov. 24, 1959, 99 N. W. 2d 522, 530 (1959):

> ". . . there exists a curious and rather widespread judicial reticence when our courts are dealing

with so-called Sunday ordinances. The judicial approach then often seems to become gingerly to the point of timidity, as though the fact that, however invalid such ordinances may be when judged by ordinary standards, after all most Sunday ordinances are plainly on the side of morality and all right-thinking people and, if they should err, they do so on the side of the angels. If such a tendency exists (and we trust we are wrong), we can only observe that an unreasonably discriminatory or otherwise invalid ordinance is no less bad because it happens also to please the pious. It is bad enough that Sunday ordinances should ever unreasonably discriminate between our people; it is doubly bad should there ever be any hint of judicial discrimination in their interpretation as against the accepted rules of interpretation applying to ordinary ordinances. Yet this apparent double standard is particularly evident in Michigan, as I shall presently undertake to demonstrate. One had not heretofore been sufficiently aware of the fact that in Michigan there are evidently Sunday standards for judging Sunday ordinances. I am now aware and I do not like what I see."

IV.

The court's decision, unless reversed, will establish the rule of law that wilful and purposeful discrimination in the enforcement of a statute by a state officer only violates the Fourteenth Amendment if the victim can show that the classification which results from the officials' wrongful actions is one which the state Legislature could not have brought about. This obviously is not the law. It would be a complete abandonment of the fundamental concept that ours is a government of law, not of men. Such a rule, moreover, is in conflict with the decisions of this Court: *Mackay Telegraph & Cable Co. v. Little Rock*, 250 U. S. 94, 100

(1919); *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23 (1931). There is a difference—a constitutional difference—between a classification made by a Legislature and one made by a law enforcement officer, particularly where he makes the discrimination for improper motives. *Yick Wo v. Hopkins*, 118 U. S. 356, 374 (1886); *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352 (1918).

V.

The refusal to pass upon the Act of 1794 raises a serious question of appropriate Federal procedure. Here the state court had less than a year before held that the Act of 1794 applied to appellant's employees and the appellee conceded that said Act still applied. Appendix A, *infra*, p. 3a. Moreover, appellant sells many items not covered by the Act of 1959 but covered by the broad language ("all worldly employment") of the Act of 1794. See *Chicago v. Atchison T. & S. F. R. Co.*, 357 U. S. 77 (1958); *Public Utilities Commission v. United States*, 355 U. S. 534 (1958); *County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185 (1959), particularly with respect to whether jurisdiction should have been maintained pending a state court determination and what protective relief by way of an injunction or a stipulation by a responsible state officer of no enforcement pending decision appellant was entitled to in the interim. *Cf. Doud v. Hodge*, 350 U. S. 485 (1956); *Harrison v. NAACP*, 360 U. S. 167, 178-79 (1959).

VI.

The questions presented by the instant case and by the decision of the court below are substantial and important. Since the decision was by a specially constituted three-judge court it would seem that appellant has a statutory right to

present its views and argument before this Court. *Query v. United States*, 316 U. S. 486, 490-91 (1942); *cf. Radio Corp. of America v. United States*, 341 U. S. 412 (1951). Moreover, the decision is not an isolated decision of an inferior court which, though in error, does not present that recurring type of situation which this Court will review. Since 1950 there have been repeated petitions to this Court seeking a final determination on the constitutionality of the Sunday laws of various states. *Cf. International Brotherhood of Teamsters, A. F. L. v. Vogt, Inc.*, 354 U. S. 284 (1957). In addition, this is a recurring problem presently before the Supreme Courts of many states as well as lower federal courts. See *e.g. Bargaintown, U. S. A., Inc. v. Whitman*, U. S. D. Ct. for the Middle District of Pennsylvania, Civil Action No. 6760; *Braunfeld v. Gibbons*, U. S. D. Ct. for the Eastern District of Pennsylvania, Civil Action No. 26,945; *McGowan v. Maryland*, 151 A. 2d 156 (Md., 1959), *appeal docketed in this Court* at October Term, 1959, No. 438; *Sarner v. Township of Union*, Superior Ct. of N. J., Law Revision, Docket No. L-13061-57 P. W. (May 7, 1959).

Since the problem is fundamental, touching on a controversial religious question, the legal controversy will be resolved only by a determinative decision of this Court after full argument aided by comprehensive briefs on the merits.

CONCLUSION.

The Pennsylvania Sunday Laws here in question were found by the court below to be religious in purpose and effect. It is apparent that the court refrained from invalidating them only because of the order of this Court in the *Friedman* case, which, if it be a decision on the merits, was predicated upon an entirely different fact finding. The arbitrary classifications and exemptions in these laws could be sustained in no context other than a religious one. Appendix A, 19a.

The questions herein presented are substantial and of great public and immediate importance. Appellants request that jurisdiction be noted and this case be set for argument at the same time as No. 532, October Term, 1959.

Respectfully submitted,

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
LOUIS E. LEVINTHAL,
2635 Fidelity-Philadelphia
Trust Building,
Philadelphia 9, Pa.,

MORRIS EFRON,
502 Turner Street,
Allentown, Pa.,
Attorneys for Appellant.

DILWORTH, PAXSON, KALISH,
KOHN & DILKS,
HARRY A. KALISH,
OSCAR BROWN,
Of Counsel.

Dated: February 11, 1960.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 25626.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Plaintiff,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,
Defendant.

Before: HASTIE, *Circuit Judge;* WELSH, *Senior District Judge;* and LORD, *District Judge.*

OPINION.

[Filed December 1, 1959]

By HASTIE, *Circuit Judge.*

This case has been tried to a statutory three-judge court constituted as provided in Sections 2281 and 2284 of Title 28, United States Code. The plaintiff, Two Guys From Harrison-Allentown, Inc., seeks an injunction to prevent the District Attorney of Lehigh County from enforcing against its employees, and thus against its retail selling business, the criminal sanctions of the Pennsylvania Sunday closing laws, sometimes called the Sunday "blue laws". Continuously since 1957 plaintiff has operated a large department store, employing some 300 persons, in a suburban

area near the City of Allentown in Lehigh County. This store opens for business on Sunday as well as on the other six days of the week. About one-third of its business is done on Sunday.

The pleadings allege and the evidence establishes as a fact that, prior to a 1959 amendment of the "blue laws", the defendant had undertaken to enforce against the plaintiff's business and its employees the general provision of the Act of June 24, 1939, P. L. 872, § 699.4, 18 P. S. § 4699.4 that "whoever does or performs any wordly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted) . . . shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars . . . ." It is also alleged and appears as a fact that the defendant is now threatening to enforce against the plaintiff's business and employees Section 699.10 as added to the Sunday closing law by the Act of August 10, 1959, P. L. 212, 18 P. S. § 4699.10, which reads as follows:

> "Whoever engages on Sunday in the business of selling, or sells, or offers for sale on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business, or office furnishings, household, business, or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall upon conviction thereof in a summary proceeding for the first offense be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.
>
> "Each separate sale or offer to sell shall constitute a separate offense . . . ."

The evidence does not show and the court does not find any present or continuing threat to enforce against plaintiff's retail selling the above quoted provision of the 1939 statute, although the defendant has expressed the legal view that both the old Section 699.4 and the new Section 699.10 apply to the situation of the plaintiff.

In these circumstances a question arises at the outset which affects the scope of proper present inquiry. Since the 1959 amendment has made the retail sale of specific categories of merchandise on Sunday a wrong punishable by a fine of one hundred dollars, does the sale of such merchandise continue to be punishable by a fine of four dollars under the older general prohibition of "worldly employment or business or Sunday"?

The 1959 enactment says nothing about the earlier general prohibition although it was enacted as an amendatory addition to Section 699 of the Penal Code in which the earlier prohibition appears. We think it can reasonably be argued that the new section supersedes the older one insofar as the latter covered in generality activities now specifically dealt with and more severly punished in the amendatory enactment. *Cf. Commonwealth v. Brown*, 1943, 346 Pa. 192, 29 A. 2d 793; *Commonwealth v. Gross*, 1941, 145 Pa. Sup. 92, 21 A. 2d 238. In any event, here is a substantial unsettled question concerning the construction of the questioned state legislation. When the Pennsylvania courts decide this question they may well resolve it by an interpretation which will relieve the plaintiff and those associated with it of any punitive action under the 1939 statute.

In such a situation it is our duty to refrain from passing upon the constitutionality of the 1939 statute until the state courts have made clear whether it applies at all to the plaintiff since the 1959 amendment. *Harrison v. N. A. A. C. P.*, 1959, 360 U. S. 167; *Spector Motor Service v. McLaughlin*, 1944, 323 U. S. 101; *Railroad Commission v. Pullman Co.*, 1941, 312 U. S. 496. Even if the statute were clear, a court of the United States should, as a matter of

policy to minimize interference with state action, refuse gratuitously to pass on the constitutionality of a provision of a state law when the plaintiff cannot show present urgent need for federal intervention to prevent actual or imminently threatened deprivation of constitutional right. Plaintiff is in no such jeopardy now under the 1939 statute. In these circumstances we think it inappropriate to pass upon the constitutionality of the 1939 statute at this time or even, as was done in the cases cited above, to hold the case *sub judice* pending an interpretative state ruling. It is enough to say that our disposition of the present case shall not bar future resort to this court by the plaintiff if and when the state courts shall authoritatively decide that the 1939 statute still applies to selling which is covered by the 1959 amendment, and if and when plaintiff's business shall be jeopardized by a present threat of prosecution under the 1939 statute. The present adjudication will concern the 1959 amendment only.

Plaintiff attacks the Pennsylvania legislation commanding the cessation of certain worldly activity on Sunday as state action promoting "an establishment of religion" contrary to the prohibition of the First Amendment, as made applicable to the states by the Fourteenth Amendment. The argument is that this required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ. There is testimony which establishes as a fact in this record that this view of the religious significance of enforced Sunday work stoppage is sincerely held by many persons whose religion not does not recognize the divinity or resurrection of Jesus of Nazareth or the sacredness of Sunday as the "Lord's day".

At the outset we consider a contention that this First Amendment argument has been foreclosed by authoritative determinations of the constitutionality of Sunday laws es-

sentially similar to the Pennsylvania statute. At the turn of the century, before the Supreme Court had ruled that the First Amendment guarantees are enforceable through the Fourteenth Amendment against the states,[1] Sunday "blue laws" were upheld in two familiar decisions of the Court. *Hennington v. Georgia*, 1896, 163 U. S. 299; *Petit v. Minnesota*, 1900, 177 U. S. 164.[2] If these stood alone their present authority would be questionable in the light of the development of constitutional concepts during this century. But more recently a new test of the constitutionality of Sunday legislation was sought in an appeal to the Supreme Court from a conviction under the New York Sunday laws. *Friedman v. New York*, 1951, 341 U. S. 907. In the jurisdictional statement filed in the Supreme Court in support of that appeal the appellant said: "The question to be resolved is an important one: Are *Hennington v. Georgia* and *Petit v. Minnesota* still law in view of the *Everson* and *McCollum* decisions"? Accordingly, it is appropriate that we examine that case carefully.

The defendants in the *Friedman* case, who were Orthodox Jews, had been convicted of the retail selling of kosher meat on Sunday in violation of the New York prohibition against "all manner of public selling [except for many miscellaneous exemptions] . . . upon Sunday . . . . ." 39 N. Y. Consol. Laws, McKinney, 1944, § 2147. The defense was carefully planned and organized under the direction of Leo Pfeffer, Esquire, a distinguished advocate and legal writer who had specialized in the field of religious

1. The ruling as to freedom of religion was first made in 1940 in *Cantwell v. Connecticut*, 310 U. S. 296, 303, although first foreshadowed fifteen years earlier. *Gitlow v. New York*, 1925, 268 U. S. 652.

2. See also the earlier dictum in *Soon Hing v. Crowley*, 1885, 113 U. S. 703, 710: "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

liberty.[3] Before the Supreme Court the appellant's very explicit statement of "Questions Presented" read in part as follows:

> "1. Whether the New York Sabbath Law (Article 192 of the New York Penal Law) is a law respecting an establishment of religion and is, therefore, invalid in its entirety under the First Amendment to the United States Constitution which is made applicable to the States by the Fourteenth Amendment.
>
> "2. Whether the New York Sabbath Law is constitutionally invalid as violative of the freedom of religion provision of the United States Constitution, because it fails to exempt from its operations persons whose religious convictions compel them to observe a day other than Sunday as their holy day of rest.
>
> "3. Whether the New York Sabbath Law by reason of its 'crazy quilt' pattern of inclusions and exclusions is arbitrary and discriminatory and therefore violative of the 'equal protection of the law' and 'due process' provisions of the United States Constitution."

Of course these points were appropriately elaborated. Moreover, they had been raised at trial and had been considered and decided against the defendants by the highest court of New York. *People v. Friedman*, 1950, 302 N. Y. 75, 96 N. E. 2d 184. Indeed, Mr. Pfeffer points out in his book, and his submission must have made it plain to the Supreme Court, that this was essentially a test case to determine the vitality of the doctrine of the *Hennington* and *Petit* cases in the light of contemporary understanding of the reach of the First and Fourteenth Amendments. There can be no question but that the Supreme Court was plainly urged to find in the New York law the very consti-

3. Pfeffer's CHURCH, STATE, AND FREEDOM, 1953, discusses Sunday laws in general and the *Friedman* case in detail at pages 227-241.

tutional infirmities we are now asked to find in the Pennsylvania law. Yet, without permitting oral argument the Court disposed of the case in a per curiam opinion dismissing the appeal and saying merely: "The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question." 341 U. S. 907. In these circumstances the *Friedman* case seems to mean that in the Supreme Court's view such legislation as the New York law is so clearly invulnerable to First and Fourteenth Amendment attack that it would not even be useful to permit further argument of the matter.[4]

In effect, the Court was content to leave as the law of the land its old reasoning that "the legislature having . . . power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say

4. As early as 1902 the Supreme Court recognized the stare decisis effect of its per curiam disposition of cases properly appealed to it. *Fidelity & Deposit Co. v. United States*, 1902, 187 U. S. 315, 349. In more recent times this point has become important in the administration of the Court's rules and procedure which require that an appeal of right from a state court be supported by a jurisdictional statement, stating "the reasons why the questions presented are so substantial as to require plenary consideration . . . ." Rule 15, par. 1(e), 346 U. S. 962. If that showing is insufficient or unpersuasive a per curiam dismissal for want of a substantial federal question or a summary affirmance of the judgment below follows. Unless such a dismissal is grounded in some procedural or technical insufficiency of appellant's presentation, its meaning seems to be that the disposition of the federal question by the state court was clearly right. In essence, such a per curiam is likely to be a particularly emphatic ruling on the merits of the question. The Court itself has explicitly recognized such summary rulings as authoritative precedents. *Baskin v. Industrial Accident Commission*, 1949, 338 U. S. 854; *North Coast Transportation Co. v. United States*, 1944, 323 U. S. 668. See also the statement of Mr. Justice Brennan, concurring in *Eason v. Price*, 1959, 360 U. S. 246, 247, that, "votes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ."

that the wrong day was fixed. . . ." See *Hennington v. Georgia, supra,* at 304.

As an inferior court asked to hold unconstitutional the Pennsylvania laws prohibiting certain Sunday retail selling, we can escape from the obligation to apply the ruling in the *Friedman* case only if the Pennsylvania law is so significantly different from the New York law that a different result can be reached and justified without departing from the legal view for which the *Friedman* case stands.

It has been suggested that the New York law differs significantly from the Pennsylvania law in two respects. First, the aim to protect the Christian Sabbath from profanation is said to be much plainer in Pennsylvania than in New York. In this connection, the text of the laws, their history and their judicial interpretation all are relevant. The basic Sunday "blue laws" of Pennsylvania, New York and many other states today are derived from colonial and early state statutes which, in turn, had been derived from British laws designed to require observance and to prevent profanation of the Christian Sabbath. A hundred years before the American revolution an English statute prohibited any person from engaging in "worldly labor or business or work of the ordinary calling on the Lord's Day, works of necessity and charity excepted". 1676, 29 Car. II, C. 7. The colonial theocracies, among them both New York and Pennsylvania, adopted markedly similar legislation which they reenacted after they became states of the United States of America.[5] The basic Pensylvania statute as it has come down to us in Section 699.4 of the codification of 1939, with its prohibition of "worldly employment or business . . . . on the Lord's Day", has already been set out. The New York statute, 39 N. Y. Consol. Laws, McKinney, 1944, § 2140 begins with this declaration:

5. See the summary of the evolution of legislation against "Sabbath breaking" in New York from colonial times in the dissenting opinion of Judge McCarthy in *Crown Kosher Super Market v. Gallagher,* D. Mass., 1959, 176 F. Supp. 466, 477, 484.

> "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

Pursuant to this declaration the statute prohibits, among other things, "all manner of public selling" except for miscellaneous exemptions. § 2147. We thing it cannot be seriously questioned that in their relation to the first day Sabbath as an institution of Christianity the New York and Pennsylvania statutes have a common background and were in original conception designed to the same end. Moreover, the involvement of religious considerations appears clearly on the face of the basic statute in both states.

Local judicial interpretation of the two statutes tells the same story. In the case of *People v. Dunford*, 1912, 207 N. Y. 17, 20, 100 N. E. 433, the Court of Appeals declared:

> "That the legislature has the authority to enact laws regulating the observance of the Sabbath day and to prevent its desecration is not, and cannot well be, disputed. The day is set apart by the statute for repose and for religious observance; objects which pertain to the physical and moral well being of the community. As to the acts which should be prohibited, as disturbances, or profanations, of the Sabbath day, the legislature is the sole judge."

Similarly in *People v. Moses*, 1893, 140 N. Y. 214, 215, this language appears:

> "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being of the people, and the peace, quiet and good order of society, has authority to regulate its observance, and prevent its desecration by any appropriate legislation is unquestioned."

See also *People v. Zimmerman*, 1905, 95 N. Y. S. 136. Finally, in the *Friedman* case itself, the opinion of the New York Court of Appeals, which was submitted to the Supreme Court for review, explicitly recognized the religious origin of the New York statute. 302 N. Y. at 79, 96 N. E. 2d at 186.

We find nothing in the cases discussing the Pennsylvania legislation and its background which makes any plainer the religious considerations which underlie the adoption of the "blue laws" of that state and from time to time have been utilized to justify them. The historical religious connection is so clear in both state statutes as to be obvious and indisputable. It has been stressed that the Supreme Court of Pennsylvania in upholding the local statute had gone so far as to say that "Christianity is part of the common law of Pennsylvania". *Commonwealth v. American Baseball Club of Philadelphia*, 1927, 290 Pa. 136, 138 Atl. 497, 499. But a New York case, *People v. Ruggles*, 1811, 8 Johns 290, went just as far.

Thus, the Supreme Court in the *Friedman* case was faced with very substantial indicia of the statute's relation to religion, strikingly similar to those appellant urges upon us now. We can see no basis for reasoning that the Pennsylvania statute is unconstitutionally related to an establishment of religion without bringing the New York statute under the same interdiction. Yet, the Supreme Court sustained the New York statute summarily. If the view of the establishment of religion question thus authoritatively established by the Supreme Court is to be changed it is for that Court, not an inferior court, to do so. Our conclusion that the *Friedman* case has broad and controlling significance on the issue of establishment of religion is contrary to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market v. Gallagher*, D. Mass. 1959, 176 F. Supp. 466. That opinion disposes of this problem of controlling authority in a brief footnote which is not elaborate enough to make the court's

reasoning clear to us. It affords no useful critique of our own analysis which indicates that the *Friedman* precedent is controlling.

As a separate point the plaintiff urges that the 1959 amendment is a denial of equal protection of the laws in that it unreasonably singles out certain types of retail selling for mandatory Sunday closing under heavy penalty—a hundred dollar fine, and twice that on subsequent offenses—while many other kinds of commercial activity are either permitted on Sunday or, if prohibited, subjected only to a very small fine, in most cases only four dollars.

This line of argument against Sunday closing statutes, no less than the First Amendment argument, has a considerable history of Supreme Court adjudication. Indeed, essentially the same argument was made against another provision of the Pennsylvania "blue laws" in *Commonwealth v. Grochowiak*, 1957, 184 Pa. Super. 522, 136 A. 2d 145. The Pennsylvania courts considered and rejected any argument that closing Sunday movies under a fifty dollar penalty while other worldly amusements and activities were permitted, or at least prohibited under the much smaller four dollar penalty, was arbitary and unreasonable and a denial of equal protection of the laws. The case was taken to the Supreme Court where the appeal was dismissed for failure to present a substantial federal question. 358 U. S. 47. In *State v. Towery*, 1954, 239 N. C. 274, 79 S. E. 2d 513; appeal dismissed 347 U. S. 925, a Sunday seller of general merchandise complained that a North Carolina law prevented him from operating on Sunday yet allowed drug stores to remain open and to sell the same kinds of merchandise. The North Caroline courts sustained the statute and the Supreme Court dismissed the appeal. Similar summary dismissal has been the fate of other recent claims of arbitrary classification and unreasonable discrimination in the selection of certain businesses and activities for Sunday closing while others, said to be no less objectionable, remained unmolested. *State v. Kidd*, 1957, 167 Ohio St. 521, 150 N. E. 2d 413, appeal dismissed 358 U. S. 132;

Gundaker Central Motors v. Gassert, 1956, 23 N. J. 71, 127 A. 2d 566, appeal dismissed 354 U. S. 933; *State v. McGee*, 1953, 237 N. C. 633, 75 S. E. 2d 783, appeal dismissed 346 U. S. 802. This point was also involved in the *Friedman* case, which has already been discussed in relation to the establishment of religion issue. Indeed, the Fourteenth Amendment argument of arbitrary classification seems to have been made as strongly there as was the First Amendment argument. See Pfeffer, CHURCH, STATE, AND FREEDOM, *supra*, 230-234, 239-240. The New York statute was attacked as a miscellany of pointless, irrational and discriminatory differentations in the treatment of various Sunday commercial activities. But the Supreme Court was not persuaded that the contention had sufficient merit even to require full argument.

In larger context, cases arising under the Sunday closing laws are but a striking example of the continuing reluctance of the Supreme Court to interfere with even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations. *Cf. Williamson v. Lee Optical of Oklahoma, Inc.*, 1955, 348 U. S. 483; *Kotch v. Board of River Port Pilot Commissioners*, 1947, 330 U. S. 552; *Tigner v. Texas*, 1940, 310 U. S. 141. But *cf. Morey v. Doud*, 1957, 354 U. S. 457. While *Morey v. Doud*, indicates that the Supreme Court will still strike down what it views as the most patently arbitrary of economic classifications we cannot ignore the fact that no Sunday law has seemed to the Court to raise even a substantial question in this area.

Moreover, in the case of the 1959 amendment of the Pennsylvania law, the circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action. In the present record it appears and we find that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that

of the plaintiff initiated and triggered new and rather large scale violations, and threats of others. It also appears in the testimony which is part of the legislative hearing on the bill which became the 1959 amendment of the Sunday closing law, that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute. It is probable that such considerations influenced the legislature's 1959 decision to make Sunday retail selling the subject of a new prohibitory enactment. In such circumstances we find it impossible to believe that the Supreme Court would treat this case as significantly different from those in which it has dismissed appeals for want of a substantial federal question.

Finally, it is argued that, because the general prohibition in the 1939 statute against worldly activity on Sunday has for a long time not been enforced strictly or at all against many worldly Sunday activities, it is a denial of equal protection of the law to enforce the new 1959 prohibition against the Sunday retail sale of specified kinds of merchandise. On this point the evidence is clear and we find as a fact that in Lehigh County numerous commercial and recreational activities covered by the general prohibition of the 1939 statute have long been conducted openly on Sunday, and continue, without molestation or direction to desist by the defendant or by any public officer. On the other hand, beginning in 1957 and thereafter the defendant made substantial and frequent efforts by admonition and arrest to compel the Sunday closing of numerous retail stores, including plaintiff's store. This court temporarily restrained the enforcement of the 1959 statute

against the plaintiff within a week after its enactment. Since that time enforcement of the "blue laws" in Lehigh County has been held in abeyance. In these circumstances, the court finds no sufficient basis for a finding as to the future pattern or procedure of enforcement of the new statute if and when judicial restraint shall be removed. The impracticability of such an anticipatory finding is made the more obvious by the fact, of which we take judicial notice, that the term of office of the defendant as District Attorney expires at the end of the calendar year 1959. Thus, on the present record we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities. Is this such a discrimination as denies equal protection of the laws?

It may well be a violation of public duty under state law for local public officers to ignore widespread violations of the 1939 law. But it does not follow that the enforcement of the 1959 statute denies the Sunday selling retailer due process of law. The controlling constitutional principle is that such selective or discriminatory behavior by administrative officers, though wrongful, is not a violation of the Constitution unless equivalent action by the state legislature would be unconstitutional. *Snowden v. Hughes*, 1943, 321 U. S. 1; *Owensboro Waterworks Co. v. Owensboro*, 1906, 200 U. S. 38. See also *Hayman v. Galveston*, 1927, 273 U. S. 414, 416. In the situation we now are considering the administrative failure to enforce the 1939 law against certain types of Sunday activity creates a constitutional problem only to the extent that a legislative exemption of these activities from Sunday closing would do so. But we already have pointed out that the Supreme Court has repeatedly treated the fact that a Sunday closing law is a hodgepodge characterized by many and seemingly pointless exceptions and exemptions as insufficient to raise a sub-

stantial federal question. A hodgepodge in enforcement has no greater constitutional significance.[6]

On the whole case, while the court has jurisdiction of the parties and of the subject matter under Sections 1343 and 2281 of Title 28 of the United States Code, the plaintiff has failed to show any violation of the First or the Fourteenth Amendment of the Constitution of the United States. Accordingly, plaintiff is not entitled to relief in this action.

The factual statements and legal conclusions stated in this opinion shall constitute the findings of fact and conclusions of law of the court. An order may be presented dissolving the temporary injunction heretofore entered in this case. A final order and decree may be presented denying plaintiff relief.

The foregoing opinion, which has been approved by Judge Lord, is to be filed, together with the separate opinion of Judge Welsh.

sgd. WILLIAM H. HASTIE,
Circuit Judge.

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6. In so ruling we in no way detract from the authority of the leading case of *Yick Wo v. Hopkins*, 1886, 118 U. S. 356, where the administrative discrimination practiced against Chinese entrepreneurs would have been no less invidious and constitutionally intolerable if directed by the legislature.

WELSH, *Senior District Judge*, concurring in part and dissenting in part.

It had been my hope after discussing this deep and fundamental problem with my Associates, to arrive at a completely unanimous conclusion. But a conscientious conception of Judicial duty, whether completely warranted or not, requires me to express myself in my own way on this subject.

Let me say at the outset that this Court, individually and collectively, has sought to catch the spirit as well as the letter of the various arguments of all concerned. We are all in agreement on the original legislation including that of the Act of 1939. On this religious phase of the subject I can speak from personal experience. Having been born in the late seventies and having lived in an environment and atmosphere of reverence for the Sabbath until I reached my early manhood, I know whereof I speak. That legislation was the outgrowth of deep feelings of all but a microscopic minority. The framers of the Law had gone through a religious experience and a spiritual Renaissance that clearly set before them the evils of excessive worldly pleasures and unbridled seeking and striving for worldly riches. Their principal objective was to minimize the weakening of the spiritual life by too much worldly pleasures. Labor was secondary at that time, secondary, because of the simple habits and custom of the times. Most people did their own labor. There were very few employers having control over large numbers of men. And nearly all labor, such as it was, could be suspended for a day without confusion or without inconvenience to the community.

For over a hundred and fifty years the initial legislation has been on the Statute books. Times and customs have changed, due to the different conditions under which we live. To me it seems almost an entirely different world. It is but natural that great changes should bring about a clamor for modification or repeal of those inhibitions.

An appeal for relief has been made to the Courts. Is that the proper Tribunal? After a Statute has been on the books for a hundred and fifty years or more should the Judicial Branch of the Government strike it down or should the appeal for relief be made to the Legislative Branch? Or to the people direct? Having served for many years in both the Judicial and Legislative Branches of the Government I cannot conceive that the Courts have power to make such a decision as we are asked to make in this case by the plaintiff. In expressing this conclusion I do not want to be understood as not recognizing the increased demand for a change. Sometimes the advocates of the change speak rather harshly of the framers of those laws without an understanding of the motives that prompted their enactment. Often those who resist the repeal of this legislation today, are not entirely unsympathetic with the proponents of repeal. They know that in many respects the law has been a dead letter for many years. But countless thousands of fair minded Americans who truly love God and their neighbor, look upon these laws as something pointing to a spiritual ideal—unrealized it is true—but still an expression of a desire of a great Country and a great people to attain and reach for something higher than the flesh-pots of Egypt or the corroding gold of a Midas.

During the last half century they have seen the struggle against materialism become more and more fierce. They are now seeing mighty nations rising against each other with weapons of annihilation and destruction greater than Satan himself could devise. At home and abroad they see the misery inflicted, and their hearts are troubled. They still feel safer with a declaration of principle expressing hope for an ideal still on the books of this beloved Country. And in this global struggle they just do not want to throw the life preservers overboard to lighten the ship.

That is the way I read the feeling of our people. I am moved to say this in the hope that if both groups can see

and feel what is on both sides of this question it will lead to a better understanding and a charitable goodwill on the part of all of us.

For these reasons I concur with the majority opinion in dismissing plaintiff's attack on all legislation prior to 1959.

In construing the Act of 1959 there are other considerations involved. It is frankly admitted by the sponsors of the Act that there is nothing of a religious character or element in the legislation. One can therefore fairly ask, why then should it be tacked on to an Act that was conceived and cradled in religiosity, if not in religion? The amending Act actually is one to regulate business and to deal with the competition among business men. Such far reaching effort to regulate the private lives of others should be bottomed on a firm Constitutional foundation, and the need, the necessity, and the evil to be controlled, fully met. We ask: Is it based on public health, public security, public morals, sanitation, water supply, education, or any of the factors that would, standing by themselves be admittedly a basis for the power of the legislature to enact.

I do not want to go over the ground so thoroughly covered by my Associates but I do not find that the legislation has met the test on any of these requirements. We all admit that under our form of Government there are things that the legislature cannot do. The fundamental rights of the people have never been at the unrestricted mercy of a possible unreasonable and arbitrary legislature. MOREY v. DOUD, 354 U. S. 457. And in determining whether or not the legislature has kept within the legitimate bounds it is proper for the Courts in construing legislative action to ask these very pertinent questions as stated above.

It is also the duty of the Court to take into consideration the various facts that mark the introduction of the legislation and the events leading up to such introduction. I do not think anyone will seriously argue that there is such a rising tide of spiritual interest in Sunday's observance

as to constitute a clamor for more stringent laws to insure the sanctity of the Christian Sabbath. The trend has been quite the reverse. Therefore, why this sudden eruption of Sabbath interest? All the facts leading up to the introduction of this Statute appear in the record and without desiring to be critical they are not particularly wholesome or praiseworthy. (This is no reflection on the County Officials.) High pressured salesmanship, outstanding organizing ability, a fantastic list of prohibited activity, indicate that a single target was the objective and a single purpose to regulate business competition. In addition it was enacted a few months before a highly important State election when members of the legislature from various parts of the State were put to undue and unreasonable pressure to vote for this legislation, that they would not think of supporting if it was not connected with the Sunday closing. The proponents of the legislation admit this was a helpful feature in getting it passed.

If it is conceded that this legislation is within the power of the legislature to enact, then I cannot conceive of any future legislation that cannot also be passed. We know that far-sighted men are considering the advisability of the four day working week, due to automation and the fear of unemployment. If this Act lies within the power of the legislature to enact, it will be establishing a precedent for drastic curtailment of the right to work in the future.

It is not like the daylight saving legislation, couched in the language of a recommendation or request, but in the language of a command subject to drastic penalty for violation.

This view is entirely too far to the left for me to say that the legislative branch has any such power without a specific grant of authority from the people. I would strike it down.

Sgd. Geo. A. Welsh.

APPENDIX B.

SUPPLEMENTARY FINDINGS OF FACT.

[Filed Dec. 7, 1959]

Present: HASTIE, *Circuit Judge*, WELSH, *Senior District Judge* and LORD, *District Judge*.

Pursuant to the request of plaintiff the court makes the following findings of fact in addition to those already made and stated in the course of the opinion of the court:

1. Sunday is a day designated for religious services and observances by Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day.

3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of worldly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of July 2, 1935, P. L. 599, 4 *Purd. Stat.* §§ 59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of April 25, 1933, P. L. 74, 4 *Purd. Stat.* §§ 81-77; to stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department

of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 *Purd. Stat.* §§ 121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 *Purd. Stat.* §§ 151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 *Purd. Stat.* §§ 181-185, provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, § 1, as amended, 30 *Purd. Stat.* § 265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, § 702, as amended, 34 *Purd. Stat.* § 1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, § 406, as amended, 47 *Purd. Stat.* § 4-406 (pp. 71-72).

4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 *Purd. Stat.* § 4651, 4 *Purd. Stat.* § 82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 *Purd. Stat.* §§ 153, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the first Sunday and $200 thereafter, 4 *Purd. Stat.* § 4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner, it is $100 for each sale at retail, but only $4.00 at wholesale. Sale of slip covers for automobile seats all-day Sunday entails a $4.00 fine; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter, and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas

novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

5. The Commonwealth of Pennsylvania has enacted a pattern of economic laws under the police power regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 *Purd. Stat.* § 103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, § 4, as amended, 43 *Purd. Stat.* § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 *Purd. Stat.* § 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 *Purd. Stat.* § 481 (employees of motion picture theaters must be given one day of rest per week).

6. The enforcement of the Sunday laws against plaintiff's employees, as threatened by defendant, will cause them not to work on Sundays. This will require plaintiff to close its store on Sunday, which is likely to render its entire operation unprofitable.

7. Unless enjoined, defendant will enforce the 1959 statute against plaintiff's employees, thereby causing plaintiff to suffer irreparable harm.

/s/ WILLIAM H. HASTIE,
Circuit Judge.

/s/ GEO. A. WELSH,
Senior District Judge.

/s/ JOHN W. LORD, JR.,
District Judge.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,096

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA.
PENNSYLVANIA RETAILERS' ASSOCIATION, AMICUS CURIAE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Heard on Petition for Temporary Restraining Order or Other Relief, December 9, 1959.

Before GOODRICH and STALEY, *Circuit Judges.*

OPINION OF THE COURT.

(Filed December 23, 1959)

PER CURIAM

The plaintiffs in this case have taken the position that they may appeal to the Supreme Court of the United States from an adverse decision by a three-judge court on the issue of the constitutionality of the statute and simultaneously appeal to the Court of Appeals on the issue of discriminatory enforcement of the statute. We think there is no basis for the allowance of a split appeal in this fashion. Therefore, we dismiss the appeal to this Court for want of jurisdiction. See 28 U.S.C.A. §§ 1253, 1291.

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 25626.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Plaintiff,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,
Defendant.

Present: HASTIE, *Circuit Judge;* WELSH, *Senior District Judge;* and LORD, *District Judge.*

FINAL ORDER.

And now, this 7th day of December, 1959, the above-captioned civil action having come before the court as provided in 28 U.S.C. Sections 2281 and 2284 and the court having filed its opinion and having determined that plaintiff is not entitled to any relief, it is hereby ordered, adjudged and decreed that plaintiff's prayer for a permanent injunction should be and hereby is denied and that plaintiff's complaint should be and hereby is dismissed.

/s/ WILLIAM H. HASTIE,
Circuit Judge.

/s/ JOHN W. LORD,
District Judge.

I dissent.

/s/ GEORGE A. WELSH,
Senior District Judge.

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Office Supreme Court, U.S.
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MAR 10 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. ~~609~~ 36

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, and GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM

HARRY J. RUBIN
Attorney, Pennsylvania Department of Justice
WALLACE C. WORTH, JR.
First Assistant District Attorney of Lehigh County, Pennsylvania
ANNE X. ALPERN
Attorney General's Deputy Commonwealth of Pennsylvania
Attorneys for Appellees

Department of Justice
Commonwealth of Pennsylvania
Main Capitol Building
Harrisburg, Pennsylvania

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

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AUTHORITY:

Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 Harv. L. Rev. 729 (1960) 12

IN THE
SUPREME COURT OF THE UNITED STATES

No. 699 October Term, 1959

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Plaintiff-Appellant

v.

PAUL A. McGINLEY and GEORGE J. JOSEPH,

Defendants-Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final order of the District Court be affirmed on the ground that the questions are so insubstantial as not to warrant further argument.

STATEMENT

Plaintiff filed its complaint in the present proceeding on November 22, 1958. It alleged (1) that the Pennsylvania Sunday Law of 1939 (Act of June 24, 1939, "The Penal Code", Pamphlet Laws 872, §699.4, 18 Pa. Stat. Ann. §4699.4) is unconstitutional as (a) a law respecting the establishment of religion and (b) a law unreasonably discriminatory on its face and (2) that aside from the unconstitutionality of the law itself, the defendant Paul A. McGinley, then District Attorney of Lehigh County, Pennsylvania, had enforced the law in a discriminatory fashion. Plaintiff applied for and received a temporary restraining order pursuant to 28 U.S.C. §2284 at the time of filing.

Since the plaintiff sought injunctive relief and alleged the unconstitutionality of the state statute, a three-judge district court was required. 28 U.S.C. §2281. This court was subsequently designated pursuant to 28 U.S.C. §2284.

On August 10, 1959, the General Assembly of Pennsylvania enacted Act No. 212 of its 1959 Session (Act of August 10, 1959, Pamphlet Laws 660, 18 Pa. Stat. Ann. §4699.10). This Act was not an amendment to the act cited above to 18 Pa. Stat. Ann. §4699.4, but an addition to the Penal Code of June 24, 1939, itself. Pursuant to the agreement of the parties, plaintiff then filed an amended complaint attacking the constitutionality of this new statute as well.

Following trial and argument, the District Court on December 1, 1959, handed down its opinion. By a two to one vote it denied any relief to plaintiff, holding

(1) that it need not determine the constitutionality of §699.4 of "The Penal Code" of 1939, 18 Pa. Stat. Ann. §4699.4, since the 1959 Act, adding §699.10 to "The Penal Code", 18 Pa. Stat. Ann. §4699.10, probably superseded the earlier section in so far as plaintiff's activities were concerned;

(2) that the decision of this Court in *Friedman v. New York*, 341 U. S. 907, indicated adherence by this Court to the doctrine of *Hennington v. Georgia*, 163 U. S. 299, that Sunday laws were civil regulations and presented no establishment of religion issue;

(3) that nothing in the 1959 Pennsylvania statute justified treating it differently from the New York statute sustained in the *Friedman* case;

(4) that other pertinent decisions of this Court likewise required rejection of plaintiff's argument that the 1959 statute was arbitrary and unreasonably discriminatory in its classification, citing *Grochowiak v. Pennsylvania*, 358 U. S. 47, *Kidd v. Ohio*, 358 U. S. 132, *Guadalupe Chevrolet Motors v. Gassert*, 354 U. S. 933, and *Sigle v. McGee*, 346 U. S. 802;

(5) that the factual circumstances attending enactment of the 1959 statute affirmatively suggest the existence of a rational basis for the legislative action; and

(6) that no basis for a finding of discriminatory enforcement of the 1959 statute exists since

defendant McGinley was restrained from enforcing it before it became effective and because this defendant's term of office would expire at the end of 1959.

On December 7, 1959, the District Court entered a final order denying a permanent injunction and dismissing plaintiff's complaint.

Treating this opinion on the merits, following trial and argument, as no more than a decision that its attack on the constitutionality of the statutes had been dismissed for want of a substantial federal question and arguing that the District Court, therefore, should have remanded the issue of discriminatory enforcement to a single judge, the plaintiff proceeded to appeal the discriminatory enforcement issue to the United States Court of Appeals for the Third Circuit. That Court held that no basis existed for splitting an appeal in such fashion and, on December 9, 1959, entered an order dismissing the appeal for want of jurisdiction. The present appeal, of course, raises all issues, including the issue of discriminatory enforcement, heard by the District Court. A petition for a writ of certiorari to the Court of Appeals to review its dismissal has likewise been filed at No. 700 October Term, 1959.

ARGUMENT

Plaintiff, a corporation engaged in a large-scale discount house business, here challenges the constitutionality of two sections of Pennsylvania's Penal Code, §699.4 and §699.10. In addition, it challenges the constitutionality of defendant McGinley's enforcement of §699.4 prior to his being restrained from so doing.

1. Insofar as the enforcement of §699.4 is concerned, the case is moot. Defendant McGinley was the elected District Attorney of Lehigh County, Pennsylvania, from January 2, 1956, to January 4, 1960. In the original complaint, filed on November 22, 1958, appellant sought only to restrain McGinley from threatening to arrest or from arresting appellant's employees for violation of §699.4. The amended complaint sought identical relief, adding §699.10 to its scope. No personal damages were sought from McGinley; he was sued solely in his capacity as District Attorney. McGinley's term of office having expired, no prospective relief can be granted appellant on the ground that McGinley enforced §699.4 discriminatorily.

Appellant's entire treatment of this problem is confined to one paragraph on page 5 of its jurisdictional statement, two paragraphs on pages 12-13 and one paragraph on pages 21-22. Only the last of these appears in the argument of appellant and contains nothing relating to possible mootness. Appellant's

only hint of a reason for pursuing this issue appears at the bottom of page 5 where it notes that "many prosecutions instituted by him [McGinley] still are pending". Appellee submits that such a casual reference to state criminal proceedings which are not before the Court for decision, which may involve a multitude of varying factual backgrounds and which have not been finally decided in the appropriate state courts hardly presents any reason for permitting a continuation of the discriminatory enforcement issue. The court below evidently thought this way, for it declined to determine the question.

Appellees' counsel, frankly, overlooked the nicety of appellant's motion of January 8, 1960, to the court below in which it moved to substitute appellee Joseph as "additional" defendant. This, of course, should not have been agreed to, but it cannot affect the mootness of appellant's case on this issue.

Quite apart from mootness, no valid proof of discriminatory enforcement was produced by appellant in the court below. The 1959 statute, §609.10, was never enforced by McGinley since he was restrained from doing so before it became effective. The 1939 statute was enforced by him when violations became a problem of law enforcement in Lehigh County. As a District Attorney in a small county, McGinley had only limited financial and personnel resources with which to enforce the law. Of necessity, he had to expend these resources in the way which most likely would protect the community and uphold the law. Both before and during his term of office, Sunday law violations resulting from the operation of industry or the conduct of recreational activities rarely

posed a sufficiently serious problem of law enforcement to require the neglect of more serious violations of law; hence, enforcement of the Sunday law in Lehigh County was for years admittedly lax but without discrimination.

When McGinley began to enforce §699.4, following a serious outbreak of commercial violations by appellant and other stores, his activities were not limited solely against appellant. The record proves this, and the court below confirms it (jurisdictional statement, appendix A, page 13a).

Appellant also sought to indict McGinley's enforcement by a far-fetched theory that he had been improperly induced to act by a competitor of appellant. This allegation appears in the jurisdictional statement on page 5 where appellant says that McGinley enforced the law "only" against appellant "for personal profit reasons". This invidious statement is simply untrue. The record refutes it; the court below did not even deem it worthy of mention. Appellant showed only that McGinley, in his private practice (permitted in Pennsylvania where no conflict with official duties arises), over several years' time had realized some small fees from a competitor of appellant and had engaged in a real estate transaction with this competitor. No relationship between these actions and McGinley's official conduct was shown by appellant; and, in fact, there was none.

Whatever "selectivity" of enforcement appears in the record is not the prohibited discrimination of *Yick Wo v. Hopkins*, 118 U. S. 356. It is simply the result of an exercise of reason by a public official

physically unable to achieve one hundred percent enforcement. This hardly justifies a conclusion that McGinley acted unconstitutionally.

Therefore, even assuming that this issue is not moot and that enforcement of the 1939 statute, §699.4, is before this Court, no basis exists for granting relief to appellant on this ground.

2. Despite appellant's repeated references in its jurisdictional statement to the Act of April 22, 1794, no such act is involved here. That act was expressly repealed by §1201 of the Penal Code of 1939, 18 Pa. Stat. Ann. §5201, *supra*; and the substance of its provisions was enacted as §699.4 of the Code. This latter section together with §699.10 of the Code, added in 1959, are the two statutory provisions attacked.

Attacks on Sunday laws and ordinances are far from new. What is relatively new is that the recent attacks have been made primarily, as this one is made, not by individuals who claim that they are prejudiced in the exercise of their religion, but by commercial enterprises seeking to remain open for business on Sunday.

Aside from any question of standing and assuming that the establishment of religion question is before the Court, no violation of the Constitution appears. Seven times in the past ten years this Court has dismissed for want of a substantial federal question direct appeals challenging the constitutionality of Sunday laws and ordinances on the same grounds as are raised here. *Friedman v. New York*, 341 U. S. 907; *State v. McGee*, 346 U. S. 802; *State v. Towery*, 347 U. S. 925; *Gundaker Central Motors v. Cassert*, 354

U. S. 933; *Grochowiak v. Pennsylvania*, 358 U. S. 47; *Kidd v. Ohio*, 358 U. S. 131 (1958); and *Ullner v. Ohio*, 358 U. S. 131 (1958). This Court has referred to such dismissals as dispositions on the merits. *Ohio ex rel. Eaton v. Price*, 360 U. S. 246.

Older decisions of this Court had upheld Sunday laws, characterizing them as civil regulations. *Soon Hing v. Crowley*, 113 U. S. 703; *Hennington v. Georgia*, 163 U. S. 299; *Petit v. Minnesota*, 177 U. S. 164. While these cases were decided prior to cases applying the religious protections of the First Amendment to the states under the Fourteenth Amendment, this fact cannot alter the nature of a Sunday law. If it was a civil regulation then, it is one today, not a religious law.

Confronted with this unbroken line of decisions, does the present case assert any new reason for not adhering to them? Appellant attempts to show that the Pennsylvania statute is unlike the various statutes attacked in the earlier cases, that it is a religious law and they were not. This not only offends common sense; it is inaccurate.

Most Sunday laws do, of course, find their origins in religious views. The Pennsylvania Act of 1794 was no exception. But to hold that §699.10 of the Penal Code, enacted in 1959 (or §699.4, enacted in 1939) is tainted because of a 1794 act would mean that a legislature is forever forbidden to act with respect to a particular subject because a prior legislature had done so in a way now thought invalid.

Secondly, antecedents of the New York statute in *Friedman v. New York*, supra, bore historical indicia

identical to antecedents of the Pennsylvania statute (and, incidentally, to the Massachusetts statute invalidated by Judge Magruder in *Crown Kosher Super Market of Mass., Inc. v. Gallagher*, 176 F. Supp. 466, now docketed on appeal at No. 532 October Term, 1959; appellees believe Judge Magruder simply erred in his treatment of the *Friedman* case). The court below in this case recognized this fact (jurisdictional statement, appendix A, pages 8a-10a).

Finally, no individual is prohibited by Pennsylvania's statute from doing anything his religion requires him to do or compelled to do anything his religion forbids him to do. The only compulsion is one placed upon all persons. Nor is any apparent tenet of one religion advanced by Sunday laws, Sunday closing and rest not appearing to be an article of Christian faith.[1]

3. Appellant's second objection to the Pennsylvania statute centers upon the classification contained therein. The 1959 Act (§699.10) purports to bar retail sales of specified commodities. The 1939 Act (§699.4) is general in scope but contains certain exceptions for acts of necessity and charity (and certain recreations).

Prior decisions of this Court have effectively answered appellant's contention. Discriminatory legislation is to be struck down only if the discrimination is "invidious", *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U. S. 483. The rules set forth in *Lind-*

[1] The "continental" Sunday is a well-known element of many contemporary societies in which Christianity is the majority religion.

sley v. Natural Carbonic Gas Co., 220 U. S. 61, 78-9, apply here; and appellant has not met the burden placed upon it by those rules. In fact, as the court below pointed out (jurisdictional statement, appendix A, pages 12a-13a) and found as a fact, the circumstances attending enactment of §699.10 in 1959 show a definite, rational basis for legislative action.

What appellant seeks is for the Court to substitute its view of the wisdom of this legislation for that of the legislature. Here, the legislature may have determined that the abuses sought to be corrected by §699.10 were greater at the retail level than at the wholesale one; it may have concluded that certain exceptions (e.g. foods and drugs) were necessary to preserve the health of the citizenry. The Courts should not revaluate these decisions unless the distinctions are "invidious". That they are not is clear.

4. The court below did not pass upon §699.4 (the 1939 Act) because it felt that §699.10 (the 1959 Act) superseded the former insofar as appellant's activities are concerned. It further concluded that resolution of this problem of statutory construction, when made by the state courts, might well prevent any application of the provision to appellant. Even if the statute clearly were applicable to appellant, however, the court below found that appellant was in no jeopardy from its enforcement.

Should the court below have passed upon the 1939 Act? Appellant says that the state court "less than a year before" (jurisdictional statement, page 22) had held this act to be applicable to appellant's employees. What appellant does not state is that this

application occurred *before* passage of the 1959 Act and concerned violations occurring prior to such passage. No error can be shown on this ground.

Section 66 of the Pennsylvania Statutory Construction Act of May 28, 1937, Pamphlet Laws 1019, 46 Pa. Stat. Ann. §566, states that when two laws, passed at different legislative sessions, are irreconcilable, the later shall prevail. The Supreme Court of Pennsylvania has held that a specific penal provision will apply to an act in lieu of a general one otherwise applicable. *Commonwealth v. Brown*, 346 Pa. 192. Under these circumstances, the lower court wisely did not conjecture that both laws could be applied to appellant's employees, particularly since it found that appellant was in no danger under the 1939 Act.

CONCLUSION

Even in an area of law so charged with emotion (and economics), the light of reason occasionally intrudes. In the February, 1960, issue of the Harvard Law Review, 73 Harv. L. Rev. 729, appears a Note, "State Sunday Laws and the Religious Guarantees of the Federal Constitution", dispassionately analyzing the present problem. Its conclusion, fairly stated, appellees submit, is that Sunday laws do not violate the federal constitution,[2] that such laws serve a legitimate social purpose in contemporary society and that they stem from a reasonable exercise of legislative power.

[2] Except possibly in one instance, not involved here, concerning recreational prohibitions.

Throughout their long history, Sunday laws have hardly reflected either a unanimous public sentiment or an approach perfect in its symmetry. But lack of these features does not render them unconstitutional. Nothing, moreover, in the present attack, justifies a departure from the prior decisions of this Court for nothing has occurred to give merit to this appeal or lend substantiality to the questions raised.

For the foregoing reasons, appellees move that the order of the court below be affirmed.

Respectfully submitted,

HARRY J. RUBIN
Attorney, Pennsylvania Department of Justice

WALLACE C. WORTH, JR.
First Assistant District Attorney of Lehigh County, Pennsylvania

ANNE X. ALPERN
Attorney General, Commonwealth of Pennsylvania

Attorneys for Appellees

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IN THE

Supreme Court of the United States

October Term, 1959.

No. ~~609~~. 36

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
LOUIS E. LEVINTHAL,
2032 Eighth Pkwy. Trust Bldg.,
Philadelphia 3, Pa.

MORRIS ELKUS,
502 Turner Street,
Allentown, Pa.,

Attorneys for Appellant.

Of Counsel:
DOLPHIN, PAXSON, KALISH, KOHN & DILKS,
HARRY A. KALISH,
OSCAR BROWN,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 699.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, AND GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM.

1. Appellees open their Motion with an argument as to mootness, which on hasty reading might seem to be intended to apply to all the issues here, although actually, despite its prominent position in the Motion, it is limited to "the [discriminatory] *enforcement* of § 699.4."

This case is not moot, in any respect.

(a) The Act of 1959, referred to by appellees as Section 699.10 of the Pennsylvania Penal Code, appellees themselves admit, will be enforced by the present District Attorney if he is not enjoined. See Motion and Order, dated January 8, 1960, adding Joseph as an additional substituted defendant.

(b) The Act of 1794, re-enacted *ipsissimis verbis* when the Pennsylvania Criminal Laws were codified in 1939, as Section 699.4 of the Penal Code, will likewise be enforced by the present District Attorney if he is not enjoined. Even if appellees are correct in their present assertion (which is contrary to the position taken by

them at the trial), that the Act of 1794 cannot be applied to the sale of an item also covered by the Act of 1959, that does not dispose of the matter. As the record shows, appellant sells many items covered only by the Act of 1794 and not by the Act of 1959.

(c) The issue of discriminatory enforcement, as distinguished from the constitutional infirmity of the statutes themselves, likewise is not moot, even though the discriminating District Attorney has now left office. The decision of a great number of criminal proceedings instituted by him during the period December 2, 1957 to November 22, 1958 and from December 7, 1959 to January 4, 1960 has been deferred by the local courts pending the final decision in this case. If the decision is favorable to appellant on the issue either of discriminatory enforcement or of the constitutionality of the statute, those prosecutions will be dismissed. Otherwise, they will be proceeded with, to the substantial injury of the appellant. Cf. *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, 453 (1911).

2. The record does show a shocking case of discriminatory enforcement, pursuant to a conspiracy with appellant's principal competitor, with the District Attorney receiving very substantial sums of money from the competitor. The three-judge court avoided a definitive decision on this issue on the ground that the District Attorney would go out of office shortly anyway, so that this issue would become moot. For the reason just stated, this was an erroneous view.

In the event that certiorari were denied in the companion case, October Term, 1959, No. 700, because of the recent decision in *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, October Term, 1959, No. 49, March 7, 1960, it would appear appropriate to hear argument on the issue of discriminatory enforcement in this direct appeal.

3. The court below found as facts that the laws in question here are religious in purpose, application and effect. It appears from their opinion and the opinion filed in

the companion case of *Bargaintown, U. S. A. v. Whitman*, Civil Action No. 6760 (U. S. D. C. for M. D. of Pa.) that if it had not been for the one-line order of the Supreme Court in *Friedman v. New York*, 341 U. S. 907 (1951), the court below might very well have reached the same conclusion as the three-judge court for the District of Massachusetts in *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466, now on appeal at No. 532, October Term, 1959. It is respectfully suggested that it would be appropriate to accord plenary consideration to these fundamental constitutional issues, now that two judges of the Courts of Appeals (Judges Magruder and Woodbury) and one District Court Judge (Judge Welsh) have found that such legislation is unconstitutional, and one Court of Appeals Judge (Judge Hastie) and two District Judges (Lord and McCarthy) have found that it is constitutional.*

If the *Crown Kosher* case is affirmed, it would be inconsistent not to reverse here, particularly without oral argument. If oral argument is granted in *Crown Kosher*, it would appear appropriate to hear this appeal at the same time.

4. The distinctions made by the Pennsylvania Sunday legislation are "invidious", to borrow a word from appellees. The 1959 law, if it is not really a religious law, as found as a fact by the Court below, is a cynical effort in the name of religion to destroy the discount stores which cater to Sunday family shopping groups, who cannot visit conveniently the large center-city department stores during the week, and who prefer economy to expensive "services". Such discount stores, moreover, have been the vehicle by which the small merchants who have been driven out of business by the large downtown department stores have been able to reenter business. They constitute the independent concessionaires in the discount stores who, by join-

* The emphasis in the Conclusion of the Motion to affirm of a student Law Review note adds little weight to the Motion. E.g., 5 Villanova L. Rev. 308 (1960) is contra.

ing together, have been able to buy in large quantities and also have the advantage of a lower rent per square foot.

5. This plaintiff, having been found by the court below to be suffering actual damage by enforcement of the legislation claimed to be unconstitutional, has standing to maintain this litigation. *Pierce v. Society of the Sisters of the Holy Names*, 268 U. S. 510 (1925) (particularly with respect to the holding dealing with the military academy which had no religious connection whatsoever); see also, *Barrows v. Jackson*, 346 U. S. 249 (1953); *Bartels v. Iowa*, 262 U. S. 404, 410-411 (1923); *Buchanan v. Warley*, 245 U. S. 60 (1917); *Truax v. Raich*, 239 U. S. 33 (1915); *Helvering v. Gerhardt*, 304 U. S. 405 (1938); *Metcalf v. Mitchell*, 269 U. S. 514 (1926).

Appellant, therefore, respectfully moves that the Motion to Affirm be denied, and that probable jurisdiction be noted and oral argument be granted in this case, so that the vital constitutional issues raised by this record may receive the plenary consideration not yet accorded them in this century.

Respectfully submitted,

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
LOUIS E. LEVINTHAL,
2635 Fidelity-Phila. Trust Bldg.,
Philadelphia 9, Pa.,
MORRIS EFRON,
502 Turner St.,
Allentown, Pa.,
Attorneys for Appellant.

DILWORTH, PAXSON, KALISH, KOHN & DILKS,
HARRY A. KALISH,
OSCAR BROWN,
Of Counsel.

March 28, 1960

Supreme Court of the United States

IN THE

OCTOBER TERM, 1959

No. 36

TWO GUYS FROM HARRISON ALLENTOWN, INC.,

Appellant,

vs.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. SEC. 2281 ET SEQ.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE PRIOR TO CONSIDERATION OF JURISDICTIONAL STATEMENT FILED WITH CONSENT OF THE PARTIES UNDER RULE 27 (9) b).

LAWRENCE SPEISER,
1612 Eye Street, N. W.,
Washington, D. C.,
ROWLAND WATTS,
170 Fifth Avenue,
New York 10, N. Y.,
JACOB S. RICHMAN,
43 South 19th Street,
Philadelphia 3, Penna.,
Counsel for American Civil Liberties Union.

Alden A. Fiske, 1025 Bankers Securities Bldg., Phila. 7, Pa.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 699.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant.

vs.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,
Appellees.

ARGUMENT OF AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE.

The American Civil Liberties Union appears *amicus* with consent of the parties in support of the position advanced by the appellant, "Two Guys from Harrison-Allentown, Inc.", having appeared in the same position in the courts below. This brief seeks to avoid mere reiteration of appellant's presentation.

The American Civil Liberties Union is a non-profit, nonpartisan organization dedicated to the protection and advancement of the rights guaranteed in the Constitution of the United States and particularly in the Bill of Rights.

One of the most important rights granted by the United States constitution is that relating to the prohibition of the

establishment of religion and the freedom of religion under the First Amendment. In relation to the Sunday laws restricting the right of persons to labor on Sunday and to sell legitimate merchandise on Sunday, state legislatures have declared that these laws do not purport to be laws relating to religion but are really laws designed to protect the health and welfare of the population by limiting their right to labor to six days per week and restricting the sale of merchandise to six days per week, and are alleged to be constitutional under the police power. This is patently a subterfuge to hide the real purpose of the legislation, namely,—to set aside Sunday as the Christian Sabbath so as to insure its religious observance for the majority of the American population, *Willis, Constitutional Law* (1936), p. 749. We, however, will accept the premise of the legislatures and proceed to attack the constitutional validity of the Sunday Laws on the ground that although the police power does enable a legislature to require each person to desist from work for at least one day per week and that each business refrain from selling merchandise for at least one day per week, the police power does not permit the legislature to designate a particular day of the week. In other words, a statute may limit the freedom of an individual to contract to sell and to sell his labor for seven days a week but it may not deprive the individual of his right himself to choose the day on which he will refrain from labor. A statute may not limit the freedom of a person, individual or corporate, to sell merchandise seven days per week under the guise of requiring that business to remain idle at least one day per week.

At common law all business can be transacted on Sunday, *Commonwealth v. Foster*, 28 Pa. Superior Ct. 400 (1905); *Commonwealth v. Teaman*, 1 Philadelphia 460, 461 (1853). Statutes are required to make Sunday business illegal, provided there is no constitutional inhibition. The Supreme Court of the United States has upheld a law making it unlawful to run a freight train on Sunday in *Hennington v. State of Georgia*, 163 U. S. 299 (1896), stating at page 305:

> "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regular recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest."

It is the contention of the American Civil Liberties Union that while the legislature may require a day of rest in seven, it is not within the competency of the legislature to fix the day of rest, and the Supreme Court of the United States as constituted in 1896 was in error when it so declared without demonstrating by authority, logic and reason that the legislature possessed the right to designate a specific day for rest and not allow the individual to determine for himself the day upon which he wishes to desist from labor, a day which best accords with his religious convictions or his economic or social desires.

The law is clear that the legislature under the police power may require each person to desist from labor one day in seven. This restriction constitutes a limitation upon the liberty of the individual which is justified by the community's need to protect the health of its constituents even though involuntarily imposed. The real question is whether the State may further limit the individual's liberty and freedom by withdrawing from him the freedom to choose the day. Is there a necessity to specify a day? If the purpose is to assure a day of rest in seven, then there is no need to require a particular day since the object is to provide the twenty-four hours of rest regardless of the day. The only justification for legislative choice of one day applying to all is the difficulty of enforcement. Thus in *State of Ohio v. Ullner*, 143 N. E. 2d 849, 105 Oh. App. 546 (1957), at 851-2:

"But it is said that while requiring the observance of one day out of seven as a day of rest is a valid exercise of the police power, that power does not authorize the fixing of a specific day of the week as a day of rest. . . .

"If designating a specific week day as the day of rest is beyond the power of the legislature, it must be for some other reason. We do not think that the legislature is required to assign a reason for fixing a specific day, rather than leaving it to individual choice. We think valid reasons could be stated. In passing legislation, it is a proper object to consider the ease or difficulty of enforcement. Now certainly the power to enforce the observance of a specific day of rest would be much easier than to enforce a day of rest selected by the individual. It would seem that the latter would not only be difficult but in fact impossible to enforce."

The fact that the requirement of one day of rest in seven with the individual choosing the day would cause inconvenience in enforcement is not sufficient reason to take the right of choice of day of rest from the individual. Thus, in *Commonwealth v. Tagola*, 89 Pittsburgh Law Journal 187 (Penna. 1941), an ordinance limited the hours a barber shop could keep open. The Court states:

"The contention that adequate inspection will be impossible if the shops are open at all hours is manifestly untenable; perhaps adequate inspection may require either a larger force of inspectors or a division of the force. These, however, are mere matters of convenience for the city They do not constitute a standard for determination and afford no basis for an otherwise unwarranted interference with the use and control of the property of the complainants."

A study of the "one day of rest in seven" laws will demonstrate conclusively that they are not difficult of enforce-

ment. Five states (Arizona, California, Oregon, Wisconsin and Wyoming) have moved in the direction of adopting enforceable one day of rest in seven laws after repealing their Sunday laws, see *Sunday Laws*—25 Southern California Law Review 131, 134 (1952). New York has such a law in addition to the Sunday law for certain industries, see *People v. Klinck Packing Company*, 214 N. Y. 121, 108 N. E. 278 (1915). The law if effectively enforced by requiring the posting of a list of employes required to work on Sunday and designating other particular days of rest for each and filing a copy with the Commissioner of Labor, filing a copy of every change, and further keeping records of hours worked each day by each employe. Illinois, Massachusetts, New Hampshire and Connecticut have similar provisions. Similar methods of enforcement are applicable to cases of exemption for those who observe other Sabbaths. In such cases, the shopkeeper must close his place of business on Saturday, give notice to the local authorities of his intention to do so and post notice of this practice in the shop, see *Skottowe, the Law Relating to Sunday* (London, 1936).

There are many provisions governing hours of work of women and minors which are enforceable adequately through the keeping and inspection of records. A survey of all the laws relating to working hours, one day of rest in seven laws and exemptions for observers of other days of rest laws, indicates that enforcement of such laws to insure proper rest for the individuals concerned can be effective without requiring that the specific day of Sunday be set aside as a universal day of rest.

If, therefore, the alleged legislative purpose is to assure to each individual at least one day of rest in seven, there can be no doubt that this goal can be effectively achieved without the necessity of designating a particular day and withdrawing this right of choice from the individual. Consequently there is now a new approach to the problem of

an enforced day of rest, "a new departure which will secure permissive and protected rest to each employed person for one day in the week, the day being determined by the employed person and the employer, *A. H. Lewis, Sunday Legislation* (1902), p. VIII.

Our laws generally are directed not to the right of an owner to sell his goods, but to the manner in which he may sell them, *Commonwealth v. Gardner*, 133 Pa. 284 (1890). It is a false idea that the time of an act could have anything to do with its moral nature, all other things being equal, *Ringgold, the Law of Sunday* (1891), p. 73. It is unthinkable that there is a power in the State, absent as to secular days, to limit a right solely on Sunday, *Brattle Films v. Commissioner of Public Safety*, 333 Mass. 58, 127 N. E. 2d 891 (1956). The legislature may not limit the time when an otherwise legitimate sale may be made, but may restrict the manner in which the sale is made in order to protect the community.

"The valid exercise of the state's police power requires that there be a substantial nexus between the end to be achieved and the legislation enacted for that purpose, accomplished without interference with the fundamental rights guaranteed to the individual," *Sunday Laws*, supra at page 134. If alternative methods are available for attaining a desired end, the fact that one entails a greater deprivation than the other is a factor for consideration in the validity of the legislative choice, *Dowling, Cases on Constitutional Law* (4th ed.) p. 771, citing *Weaver v. Palmer Bros. Co.*, 270 U. S. 402 (1926); see *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951). If a legislative goal can be achieved at a lower price in terms of limitation of rights of individuals that choice must be made which least interferes with these rights, (*Note*) *Consideration of Facts in Due Process Cases*, 30 Columbia Law Review 360, 362 (1930).

Thus if the desired legislative purpose is to provide compulsorily one day of rest in seven, then the legislature in

choosing a technique to accomplish this purpose, having a choice of two methods of reaching its goal, must choose that one which least interferes with the constitutional rights of the individual consistent with effective enforcement. For if effective enforcement is absent, the goal is not achieved. If, therefore, the legislative purpose is to assure a day of rest each week, it is sufficient for the legislature to declare that no one may work more than six days a week, and to permit the individuals concerned, by contract, to determine which day of the week shall constitute the day of rest. A lengthy brief surveying the statutes relating to the enforcement of legislation providing for one day of rest in seven, for exemptions from the Sunday law for those observing other days of rest, and for hours of work for women and children, will demonstrate that techniques of enforcement are available in order to accomplish the desired goal, namely, the substantial certainty that the population will be assured under law one day of rest in seven so that the need to provide rest, recreation, worship and physical revival will be provided.

The old Supreme Court cases upholding Sunday laws based on the police power of the states to pick Sunday as a universal day of rest should be overruled as has been evidenced in recent Supreme Court decisions in matters of great public concern and changed conditions, especially since these cases indicate a failure to consider thoroughly the constitutional question of the right to choose a specific day of rest. The automobile age, the distance of shopping centers from concentrated areas of population, the demands of minorities to observe their own days of rest for purposes of religious worship, the need of the public for manifold forms of recreation and entertainment on their days of rest: all these call upon the judicial arm of our government to protect the right of all men to choose their form of rest and worship and also the time of rest and worship so long as it does not interfere with the right of others to enjoy

their days of rest and worship in the manner and at the time they see fit.

Respectfully submitted,

LAWRENCE SPEISER,
1612 Eye Street, N. W.,
Washington, D. C.
ROWLAND WATTS,
170 Fifth Avenue,
New York 10, N. Y.,
JACOB S. RICHMAN,
43 So. 19th Street,
Philadelphia 3, Penna.,
Counsel for American Civil Liberties Union.

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IN THE

Supreme Court of the United States

October Term, 1960.

No. 36.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees.

On Appeal From the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 et seq.

Brief and Appendices for Appellant.

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
HARRY A. KALISH,
LOUIS E. LEVINTHAL,
2635 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pa.,

MORRIS EFRON,
502 Turner Street,
Allentown, Pa.,

OSCAR BROWN,
1500 Bankers Securities Bldg.,
Philadelphia 7, Pa.,

Attorneys for Appellant.

DILWORTH, PAXSON, KALISH,
KOHN & DILKS,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 36.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, DEFENDANT AND GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, SUBSTITUTED ADDITIONAL DEFENDANT,
Appellees.

On Appeal From the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 et seq.

BRIEF FOR THE APPELLANT.

A.

Opinions Delivered in the Courts Below.

The majority opinion of the three-judge court, filed on December 1, 1959, is reported at 179 F. Supp. 944 (E. D. Pa. 1959), and is found in the printed Record at pp. 273 *et seq.* Senior District Judge Welsh's dissenting opinion begins at p. 286 of the printed Record.

On December 7, 1959 the three-judge court denied a timely petition for rehearing, but simultaneously filed supplemental findings of fact (Rec. 290-2).

An appeal to the Court of Appeals for the Third Circuit, solely with respect to the claim of discriminatory enforcement, was filed and was dismissed for lack of jurisdiction on December 9, 1959. An opinion thereon was filed on December 23, 1959 (Rec. 303), and is reported at 273 F. 2d 954 (3rd Cir., 1959). Appellant, simultaneously with the Jurisdictional Statement here, filed a petition for a writ of certiorari to review said dismissal. Said petition was denied on April 25, 1960. 362 U. S. 961.

An appeal to the Court of Appeals for the Third Circuit on an earlier phase of this case is reported at 266 F. 2d 427 (3rd Cir., 1959).

B.

Statement of the Grounds on Which Jurisdiction Is Invoked.

The final order from which appeal is taken is from the decision of the three-judge court entered on December 7, 1959, on which day rehearing was also denied (Rec. 297-299). The Notice of Appeal was filed December 18, 1959 in the District Court (Rec. 300). The Jurisdictional Statement was filed February 11, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1253, 1291 and 2281 *et seq.*, the appeal being from a final order of a three-judge court which refused a permanent injunction and dissolved a temporary injunction, on the ground that the state statutes attacked by appellant did not conflict with the Federal Constitution. *Query v. United States*, 316 U. S. 486, 490-91; *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 273 F. 2d 954 (3rd Cir., 1959) (Rec. 303); see also *Lee v. Roseberry*, 200 F. 2d 155, 156 (6th Cir., 1952); *cf. Radio Corp. of America*

v. United States, 341 U. S. 412. This Court noted Probable Jurisdiction on April 25, 1960. 362 U. S. 960 (Rec. 305).

C.

Statutes Involved.

The Pennsylvania statutes whose validity are involved are the basic Pennsylvania Sunday law which provides:

> "Whoever does or performs **any worldly employment** or business whatsoever on the **Lord's day, commonly called Sunday** (works of necessity and charity only excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.
>
> "Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment for the use of sojourners, travellers or strangers, or to hinder waterman from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families on the **Lord's day**, commonly called Sunday, nor to the delivery of milk or the necessaries of life, **before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day.**" Act of April 22, 1794, 3 Sm. L. 177, § 1, 18 PURD. STAT. § 4699.4 (bold face type supplied),

and the Amendatory Act of August 10, 1959 which provides:

> "**Whoever** engages on **Sunday** in the business of selling, **or sells or offers for sale, on such day, at retail,**

clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding **two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.**

"Each separate sale or offer to sell shall constitute a separate offense . . ." P. L. No. 212, 18 PURD. STAT. § 4699.10 (bold face type supplied).

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States, including the equal protection and due process clauses of the latter Amendment.

D.

Questions Presented.

The basic Pennsylvania Sunday Blue Law, the Act of April 22, 1794, 18 PURD. STAT. § 4699.4, prohibits all "worldly employment" except acts of necessity on the "Lord's day (commonly called Sunday)" so that the citizens of Pennsylvania can "read the Scriptures" and attend "religious worship." *Sparhawk v. The Union Passenger Railway Co.*, 54 Pa. 401, 408-09, 423 (1867); *Commonwealth ex rel. v. American Baseball Club of Philadelphia*, 290 Pa. 136, 143 (1927). This Act was amended on August 10, 1959 so as to impose additional and heavier penalties on those

who sold or offered to sell at retail certain enumerated merchandise on Sunday. The court below made the following findings of fact:

(1) the Amendatory Act of August 10, 1959 was to force the cessation of work on Sunday in order to commemorate weekly the sectarian religious event and doctrine of the Resurrection of Jesus Christ, the same event and doctrine as are commemorated by the Christian Easter (Rec. 276, 290);

(2) that such practice was offensive to those persons whose religious teachings were contrary to those which gave such religious significance to Sunday, including Seventh Day Adventists, Seventh Day Baptists, Jews and atheists (Rec. 276);

(3) that work on Sunday had no effect on the health or welfare of appellant's employees or customers different from work on any other day (Rec. 290);

(4) Pennsylvania has a pattern of economic laws regulating hours of work which are separate and distinct and operate completely independently of the Sunday Laws (Rec. 292);

(5) by legislative acts and court decisions many activities substantially similar to those prohibited are exempt from the Sunday Blue Law (Rec. 290-2); and

(6) many activities substantially similar to those engaged in by the appellant have been and will be permitted by law enforcement officers in Pennsylvania even though nominally prohibited by statutes and court decisions (Rec. 284).

The record also shows that for reasons of personal profit appellee, District Attorney Paul A. McGinley, wilfully and discriminatorily enforced the law only against appellant and not against other similar businesses even

though such discrimination was called to his attention and protested. The court below refrained from making requested findings on the issue of discrimination in administration on the ground that McGinley's term of office would shortly expire, which it now has, but many prosecutions instituted by him still are pending.

The questions therefore presented are:

1. Does the Pennsylvania Act of August 10, 1959, in the light of the court findings referred to above, violate the Fourteenth Amendment to the Federal Constitution because:

(a) it is a law respecting the establishment of religion;

(b) it discriminates against certain religions and prefers one religion over other religious beliefs;

(c) it requires a symbolic religious act to be performed by all Pennsylvania citizens;

(d) there is no reasonable basis for the classification of prohibited and permitted activities contained in the Pennsylvania Act of August 10, 1959 and other Pennsylvania statutes and court decisions dealing with worldly activities in Pennsylvania on the Lord's Day;

(e) it imposes oppressive and discriminatory fines?

2. Did the wilful, arbitrary and discriminatory enforcement of the Pennsylvania Sunday Blue Law against appellant by appellee, District Attorney Paul A. McGinley, deprive appellant of rights guaranteed it by the Fourteenth Amendment to the Federal Constitution?

3. Did the court below err in refusing to pass upon the constitutionality of the Act of April 22, 1794, 18 PURD. STAT. § 4699.4, and dismissing that part of the complaint on the

ground that a subsequent Pennsylvania court decision might make said statute inapplicable to appellant's employees, despite the fact that (a) there was a state court decision that said Act did apply to appellant's employees and (b) appellant sells and its employees have been prosecuted for selling many items not covered by the Act of August 10, 1959, but covered by the Act of April 22, 1794?

E.

Statement of the Case.

This appeal is from the final order of a three-judge court for the Eastern District of Pennsylvania which denied a permanent injunction and dissolved the Temporary Injunction, after upholding by a two to one vote the constitutionality of the Pennsylvania Sunday Blue Laws, including the Amendatory Act of August 10, 1959, P. L. 212, 18 PURD. STAT. § 4699.10.

Said court was convened pursuant to Sections 2281, *et seq.* of Title 28 U. S. C.

The court below expressly held that its decision was "contrary to the view of the majority of the three-judge district court which recently decided *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959)," (Rec. 282), which case is now on direct appeal to this Court at Docket No. 11, October Term, 1960, Probable Jurisdiction having been noted.

Appellant herein, Two Guys from Harrison-Allentown, Inc., operates a retail store in Whitehall Township, Lehigh County, Pennsylvania, employing 300 persons. The store is along the highway outside the City of Allentown, with a parking lot for several thousand cars and caters to the workers' family shopping group out for a Sunday drive and interested in economy as against fancy and expensive center-city department store services.

Appellant opened its store in Lehigh County at a cost of over $1,000,000 only after it had been told that no one

ever had been prosecuted for selling on Sunday and being assured by the township officials that its operation was permissible (Rec. 98, 99). After appellant was open for six months the appellee, Paul A. McGinley, then the District Attorney of Lehigh County, began to arrest appellant's employees for violations of the Act of April 22, 1794, 18 PURD. STAT. § 4699.4, the basic Pennsylvania Sunday Blue Law. These arrests and prosecutions continued every Sunday although other business activities were permitted by appellee McGinley without arrest.[1] A year later, in November, 1958, said appellee threatened to arrest appellant's employees for conspiracy, the penalty for which is a two year jail sentence and a $500 fine. 18 PURD. STAT. § 4302.

The appellant thereupon brought a bill in equity in the Federal Court for the Eastern District of Pennsylvania pursuant to 28 U. S. C. §§ 1331 and 1343, 42 U. S. C. §§ 1981 and 1983 and to 28 U. S. C. §§ 2281 and 2284. The bill in equity alleged that the Pennsylvania Sunday Law—the Act of April 22, 1794—was unconstitutional because: (a) it was a law respecting the establishment of religion; or (b) a law which prefers or places at an advantage one religion over others; (c) it denies equal protection since it was discriminatory; and (d) the appellee, Paul A. McGinley, was applying the law to appellant in a wilfully discriminatory manner. On complaint and affidavits the Court issued a temporary restraining order.

Since appellant was making an attack on the constitutionality of a state statute the matter was heard before a specially constituted three-judge court. See *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 266 F. 2d 427 (3rd Cir., 1959).

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1. The Record shows that appellee, Paul A. McGinley, discriminated against plaintiff's employees because he was improperly induced to do so by Max Hess, the President and owner of Hess' Department Store, the principal Allentown center-city department store business competitor (Rec. 135, 137-141, 155, 156-163, 198-212).

Immediately prior to the time for trial and after the filing of the Complaint, the Pennsylvania Legislature passed an amendatory act—the Act of August 10, 1959—which singled out for more severe penalty certain retail sales of particular merchandise sold by the appellant. The bill in equity was amended to include an attack on the constitutionality of this Act on the same grounds.

The court after hearing granted a preliminary injunction against enforcement of the Sunday Blue Laws against appellant after finding that "substantial and irreparable injury will be suffered by plaintiff [if the statutes are applied to it] because plaintiff will be required to discontinue the operation of its store on Sundays, the day of its largest sales volume." (Order dated September 11, 1959. (Rec. 10))

The case for a permanent injunction was tried in October, 1959. The court found that appellee, Paul A. McGinley, had threatened to enforce the Act of August 10, 1959, P. L. 212, 18 PURD. STAT. § 4699.10, against appellant's employees, that he had in the past enforced the Act of April 22, 1794, 18 PURD. STAT. § 4699.4, against appellant's employees, that appellant had no adequate remedy at law and that appellant would "suffer irreparable harm" (Rec. 274, 292).

Certain findings made by the court below also are relevant to the merits of the question of the constitutionality of the Act of August 10, 1959.

The court below found that the origin, purpose and effect of the Pennsylvania Sunday Laws, including the Act of August 10, 1959, were to force observance of the Christian Lord's Day, and that there were many persons in Pennsylvania who were offended in their religious beliefs by the required cessation of business on Sunday since it is "an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ" (Rec. 276).

The Court also made the following additional findings of fact:

"1. Sunday is a day designated for religious services and observances of Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

"2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day.

"3. Various Pennsylvania statutes create exceptions to the general statutory prohibition of worldly activity on Sunday, or increase the penalties for conducting activities prohibited thereby. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 P. M. on Sunday if the voters of the municipality so vote by referendum. Act of July 2, 1935, P. L. 599, 4 *Purd. Stat.* §§ 59-65; to play professional baseball and football after 2:00 P. M. and before 6:00 P. M. on Sunday if the voters of the municipality so vote by referendum, Act of April 25, 1933, P. L. 74, 4 *Purd. Stat.* §§ 81-77; to stage musical concerts after 12:00 noon on Sunday when authorized to do so by the Commonwealth's Department of Public Instruction and to compensate musicians participating in such concerts, Act of June 2, 1933, P. L. 1423, No. 308, 4 *Purd. Stat.* §§ 121-127; to play polo after 1:00 P. M. and before 7:00 P. M. on Sunday unless the voters of the municipality have voted to the contrary by referendum, Act of June 22, 1935, P. L. 446, 4 *Purd. Stat.* §§ 151-157; to play tennis after 1:00 P. M. and before 7:00 P. M. on Sunday, Act of June 22, 1935, P. L. 449, 4 *Purd. Stat.* §§ 181-185, pro-

vided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday, Act of April 14, 1937, P. L. 312, § 1, as amended, 30 *Purd. Stat.* § 265; to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday, Act of June 3, 1937, P. L. 1225, Art. VII, § 702, as amended, 34 *Purd. Stat.* § 1311.702; and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday, Act of April 12, 1951, P. L. 90, Art. IV, § 406, as amended, 47 *Purd. Stat.* § 4-406 (pp. 71-72).

"4. The fine for the generality of offenses, including the conduct of some games and amusements is $4.00, plus costs that run from two to four times the fine. But for bowling, baseball and football during prohibited hours, it is $10.00, 18 *Purd. Stat.* § 4651, 4 *Purd. Stat.* § 82; for polo $100, for motion pictures $50.00, for musical concerts $100 to $1,000, 4 *Purd. Stat.* §§ 152, 65, 127. For persons selling motor vehicles at retail or wholesale, the fine is $100 for engaging in business the First Sunday and $200 thereafter, 4 *Purd. Stat.* § 4699.9. For selling motor boats, it is $4.00. For selling an automobile air-conditioner, it is $4.00. For selling a home air-conditioner, it is $100 for each sale at retail, but only $4.00 at wholesale. Sale of slip covers for automobile seats all day Sunday entails a $4.00 fine; the sale of a slip cover for a living room chair at retail entails a $100 fine for the first sale and $200 for each and every sale thereafter, and for each unsuccessful offer to sell. To sell or offer to sell toys after the first offer is subject to a $200 fine, whereas novelties and souvenirs can be sold for the entire day for the payment of one $4.00 fine. Certain sports equipment is in the $4.00 category, including shoes used in forbidden sports. On the other hand, the sale of a pair of shoes for business wear is in the $100 category.

"5. The Commonwealth of Pennsylvania, has enacted a pattern of economic laws under the police power regulating hours of work, which operate completely independently of the Sunday laws. They include such statutes as Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 *Purd. Stat.* § 103(a) (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, § 4, as amended, 43 *Purd. Stat.* § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 *Purd. Stat.* § 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 *Purd. Stat.* § 481 (employees of motion picture theaters must be given one day of rest per week)." (Rec. 290-2)

The majority of the court, however, refused to declare the two Pennsylvania statutes under attack unconstitutional. With respect to the Act of August 10, 1959, it held that despite the clear proof of the religious origin, purpose and effect thereof, this Court's action in *Friedman v. New York*, 341 U. S. 907, wherein this Court dismissed an appeal with respect to a New York Sunday statute for "want of a substantial federal question," precluded an independent consideration of the constitutionality of such statute, since that decision had to be construed as a holding that any Sunday Blue Law even though religious in origin, purpose and effect, nevertheless does not violate the Fourteenth Amendment. With respect to the argument on the equal protection clause due to the unreasonable and discriminatory classification contained in the 1959 Act, the court, ignoring the religious aspect of the statute, held that where a statute deals with economic matters this Court permits "even near whimsical classifications when made by state legislatures in the selection of schemes or areas or subject matter for economic regulations." (Rec. 283).

The court below refrained from passing upon the claim that the appellee District Attorney, Paul A. McGinley, had wilfully and discriminatorily enforced Sunday Laws against the appellant. It conceded and found as a fact that there had been no enforcement prior to actions against the appellant. But it held that it would not make "an anticipatory finding" with respect to the future because the term of Paul A. McGinley as District Attorney would expire, according to the Court, on December 31, 1959. But it did state that on the present record even after appellee's term would end "we have the threat of the enforcement of the 1959 act against retail selling while many other kinds of worldly activity proscribed by the 1939 laws have continued and are likely to continue without any interference by the public authorities" (Rec. 285).

It disposed of the constitutional problem thus presented, however, by the novel theory that any discrimination that could be carried out by the Legislature through a statute would be equally valid if carried out by the individual law enforcement officer by applying the statute against only certain businesses regardless of the motive for the discrimination on the part of the official (Rec. 285).

On the theory that a Pennsylvania court might hold that activities covered by the Act of August 10, 1959 were now exempt from the broader provisions of the Act of 1794, it refused to pass upon the constitutionality of the Act of 1794. It did this despite the fact that less than a year before the highest Pennsylvania court had held that appellant's employees *were* covered by the Act of 1794, *Commonwealth v. Binder*, 188 Pa. Super. Ct. 42, 145 A. 2d 915 (1958), *allocatur refused*, 188 Pa. Super. Ct. xxviii, and appellee McGinley himself was still contending that he could arrest under the Act of 1794 (Rec. 275, 334), and appellant sold many items covered only by the Act of 1794.

As stated above, the court entered a final order denying the prayer for final relief and dissolving the Temporary Injunction previously in effect. On rehearing, the court,

inter alia, refused to retain jurisdiction of the part of the case dealing with the Act of 1794 pending a state court determination.

Appellant attempted to appeal to the Court of Appeals solely from the part of the court's order that dealt with the question of discriminatory enforcement by appellee, Paul A. McGinley, but the Court of Appeals held that an appeal from any action of a three-judge court would have to be to this Court, even with respect to the part of the case which could have been heard originally by a single judge. 273 F. 2d 954. A petition for certiorari from that Court of Appeals judgment was denied by this Court on April 25, 1960. 362 U. S. 961.

This Court on December 11, 1959, refused to reinstate the restraining order pending the Appeal.

After the expiration of the term of office of Paul A. McGinley, an order was entered below permitting appellant to add George J. Joseph, the new District Attorney, as an additional defendant (Rec. 305).

As stated above on April 25, 1960 this Court noted Probable Jurisdiction 362 U. S. 960 (Rec. 305).

F.

Summary of Argument.

The Court below found as a fact, based upon uncontradicted evidence, that the present Pennsylvania Blue Laws were religious in origin, present purpose and effect. This finding brings such Pennsylvania statutes specifically within the type of prohibited state action which this Court has condemned in all of its recent decisions. *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210-11. Even without such finding this Court would have to declare the Pennsylvania Blue Laws unconstitutional since the legislative history, as well as the Pennsylvania court decisions, make it clear that the present statutes are religious in origin, purpose and effect. The state enforced abstention

from work on Sunday is clearly a religious exercise in commemoration of the Resurrection, and such state enforced religious symbols are contrary to the Fourteenth Amendment. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 632-33, 642.

No decision of this Court is contrary to appellant's argument. The court below did not seek to sustain the statute on any basis other than *Friedman v. New York*, 341 U. S. 907, which decision is completely inapplicable in view of the findings of the court below.

Its findings, once again, show that the statutes cannot be sustained on any day-of-rest argument for purposes unconnected with religion. *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *on appeal* at October Term, 1960, No. 11.

The Pennsylvania statutes also conflict with the requirement imposed by the Fourteenth Amendment that any classification must be based upon a reasonable ground, consistent with a constitutional purpose underlying the statute.

The Court below erred in not considering the constitutionality of the Act of 1794 since the Pennsylvania decisions had made it crystal clear that this statute would be applicable to some, if not all, of appellant's activities. In any event, even if the question of state law should be referred to a state court, the federal court should have continued the Temporary Injunction, awaiting such state determination, since it had found as a fact that the enforcement of the statute against appellant resulted in irreparable harm to appellant. *Harrison v. NAACP*, 360 U. S. 167, 178-79.

G.

Argument.

I.

The Pennsylvania Blue Laws "Establish a Religion", and Discriminate Against Certain Religions, or at Least Prefer One Religion Over Others, and Therefore Violate the Fourteenth Amendment to the Federal Constitution.

The Court here is faced with a novel situation in the Blue Law issue. This is the first case in which a court below has made explicit findings of fact[2] based upon uncontradicted evidence that particular state Sunday Blue Laws are religious in origin, present purpose and present effect and yet sustained the statute against a claim of unconstitutionality.[3]

Such findings necessarily bring the Pennsylvania statutes involved here within the class of prohibited state legislation in the field of religious matters as set forth in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210-11. There, this Court stated:

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2. These findings of fact are set forth verbatim at pp. 9-12 *supra*, and at Re. 280-1, 280, 200-2.

3. The situation here is somewhat reminiscent of *Brown v. Board of Education of Topeka*, 347 U. S. 483. There the leading precedent, *Plessy v. Ferguson*, 163 U. S. 537, had assumed that racially segregated facilities which were physically equal would not have aspects which made them inherently unequal. The lower court, presented with evidence showing the inherent inequality, made a finding of such inherent inequality. See 347 U. S. 483, 494, fns. 10, 11. The lower court, nevertheless felt constrained to follow the previous decision of this Court which had assumed that there would not be such inherent inequality. This Court, of course, when faced with a finding of fact showing the actualities of the situation, refused to follow its own antiquated precedent.

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" (Boldface supplied.)

See also *Schempp v. School District of Abington Township*, 177 F. Supp. 398 (E. D. Pa., 1959), where a three judge district court declared a bible reading statute unconstitutional once it found as a fact that

"the combination of the reading of the ten verses of the Holy Bible, followed immediately by the recitation of the Lord's Prayer, . . . gives to the morning exercises a devotional and religious aspect." p. 405.

It seems equally clear that the finding of the court below that "the required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ" (Rec. 276), brings the statutes within the prohibition set forth in *Illinois ex rel. McCollum v. Board of Education, supra*, and *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. Compulsory abstention from work on Sunday is a compulsory form of religious observance, like kneeling, covering or uncovering the head and other ceremonies or symbols

"There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

* * *

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 632-33, 642.

The findings of fact made by the court below are supported by the uncontradicted and unimpeached testimony of the Jewish and Seventh Day Adventist expert witnesses. This testimony shows that the Sunday Laws are religious in origin and in present purpose and effect, and that they commemorate the Resurrection of Jesus Christ, and oblige everyone to honor a basic doctrine of the major Christian denominations by abstaining from work, which has been a traditional manifestation of religious respect among Jews for 3500 years [4] and among Christians for at least 1600 years.

Appellant has set forth, in Appendix A of this Brief, pages 1a-11a, *infra*, a summary of the testimony of the expert witnesses. In Appendix C, pages 31a-40a, *infra*, are set forth the views of the Seventh Day Adventists, prepared by their General Conference. In Appendix B, pages 12a-30a, *infra*, are references to the writings of informed Christian religious and lay scholars which recognize that Sunday is the weekly religious commemoration of the Resurrection, and that a state law which forces the compulsory abstention from work on Sunday legislatively compels observance of, and honor to, this pivotal Christian religious tenet

4. See Appellants' Brief in *Braunfield, et al. v. Gibbons, et al.*, Oct. Term, 1960, No. 67, at pages 10-13 for short summary of the high place of the Jewish Sabbath, Saturday, in traditional Judaism and the Biblical prohibition against all work on that day, even by servants, animals and strangers. On the holiest day of the Jewish year, Yom Kippur, the Day of Atonement it is commanded:

> "And ye shall do no work in that same day: for it *is* a day of atonement, to make an atonement for you before the Lord your God.
>
> "And whatsoever soul *it be* that doeth any work in that same day, the same soul will I destroy from among his people.
>
> "Ye shall do no manner of work: *it shall* be a statute for ever throughout your generations in all your dwellings.
>
> "It *shall be* unto you a sabbath of rest, and ye shall afflict your souls: in the ninth day of the month at even from even unto even, shall ye celebrate your sabbath."

LEVITICUS XXIII, 28, 30, 31, 32. See also NUMBERS, XXIX, 7. A similar admonition applied also on other holy days, as appears from these two books of the Bible, and elsewhere therein.

Overwhelming support for the findings of fact is found in the very language of the laws in question and in the various opinions of the Pennsylvania courts which have dealt with these laws, put into evidence at the trial (Rec. 46-48, 212).

The original Pennsylvania Sunday Laws were first enacted in Pennsylvania on December 7, 1682, the first year of the settlement here:[5]

> "Whereas, the glory of Almighty God and the good of Mankind, is the reason & end of government, and therefore government in itself is a venerable Ordinance of God. And forasmuch as it is principally desired and intended by the Proprietary and Governor and the freeman of the Province of Pennsylvania and territories thereunto belonging, **to make and establish such Laws as shall best preserve true Christian** and civil Liberty, **in opposition to all Unchristian**, Licentious and unjust practices, **(Whereby God may have his due**, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.
>
> "Be It Therefore Enacted By William Penn, Proprietary and Governour, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid, in Assembly met, and by the Authority of the same, That these following Chapters and Paragraphs shall be the Laws of Pennsylvania and the territories thereof. Chap. 1. Almighty God, being Only Lord of Conscience father of

5. "The idea which informs this law is that Pennsylvania was to be a Christian state on a Quaker Model. Only one condition is made necessary for office or citizenship, *viz.*—Christianity." 18 Encyclopaedia Britannica (20th *Century Edition.*) p. 506 (1905) (*Article on William Penn*).

Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship; who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind . . . .

"BE IT ENACTED BY THE AUTHORITY AFORESAID That . . . to the end That Looseness, **irreligion,** and **Atheism** may not Creep in under pretense of Conscience in this Province, BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, THAT, **according to the example of the primitive Christians,** and for the ease of the Creation, **Every first day of the week, called the Lord's day,** People shall **abstain** from their usual and common **toil** and **labour,** That whether Masters, Parents, Children, or Servants; they may the better dispose of themselves **to read the Scriptures** of truth at home, or **frequent** such meetings **of religious worship abroad,** as may best sute their respective persuasions." (Duke of York's Book of Laws, 1676-1682, pp. 107-108) (Bold face supplied.)

The Act of 1682 was reenacted on November 27, 1700 and on January 12, 1705, in the same form. *Commonwealth v. Hoover*, 25 Pa. Super. Ct. 133, 139 (1904). Then the present law, the Act of 1794, **"was enacted as a direct result of the yellow fever plague of 1793 which ran rampant in Philadelphia. The plague was regarded as a 'scourge upon a wicked people.' The Pennsylvania legislature hastened to legislate away the wickedness of the people by shackling the devil in his most prosperous day."** *Commonwealth v. Pedano*, 33 D. & C. 551, 552-553 (1938). Ministerial groups had implored the Legislature to enact such legislation. (Ex. P-1, Rec. 47). See PENNSYLVANIA SENATE JOURNAL (1793-1794), pp. 15-17, 42. The Act refers to Sunday as "the Lord's Day". The same Act also prohibited blasphemy, specifically defining blasphemy as in-

cluding improper references to "Jesus Christ."[6] The Act of 1794 was carried over to the Criminal Codification Act of 1939 without change. 18 PURD. STAT. § 4699.4. And, in recognition of the religious aspect of the basic Sunday statute, subsequent statutes exempting certain activities from the general prohibition usually provide that such exempt activities are permitted only after the morning church services (that is, beginning at 1 or 2 P. M.), and must be completed prior to evening vesper services (that is, before 6 or 7 P. M.). See, *supra*, pp. 10-11.

The Legislature in 1794 had justification for protecting the Christian Sabbath; the Pennsylvania Constitution at that time (Constitution of 1776) provided that each legislator had to take the oath that, "I do acknowledge the Scriptures of the old and new Testament to be given by divine inspiration." See SCHAPPES, DOCUMENTARY HISTORY OF THE JEWS IN THE UNITED STATES, p. 64 (1950). And the generally accepted notion then was that "Christianity, general Christianity is, and always has been, part of the common law of Pennsylvania." *Updegraph v. Commonwealth*, 11 Sergeant & Rawle, 394, 400 (1824). See also decision of Justice Story in *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, 198 to the effect that the "Christian religion is part of the common law of Pennsylvania."[7] And thus, the Legislature purposely intended that "Jews . . . are bound to observe the civil regulations made for the observance of the Christian Sabbath." *Society v. Commonwealth*, 58 Pa. 125, 135 (1866).

The Supreme Court of Pennsylvania has uniformly and repeatedly, from 1853 to date, acknowledged that the Sunday Blue Laws were based upon the fact that Sunday is a day which occupies a special position in the Christian

6. Statutes on blasphemy had been used in the persecution of Jews. See, *e.g.*, *Indictment of Dr. Jacob Lumbroza in Maryland*, February 23, 1658, *Records of the Provincial Court (Maryland)* Lib. S. 1658-1662, *Judgments*, pp. 154-164.

7. As late as 1892 Justice Brewer in *Holy Trinity v. United States*, 143 U. S. 457, stated, "This is a Christian Nation."

religion. In *Sparhawk v. The Union Passenger Railway Co.*, 54 Pa. 401 (1867), the Court said:

"All these questions, and a multitude of others of similar character, must be answered in the affirmative; if running railway cars on Sunday on city passenger railways is a work of necessity within the meaning of the exception in the Act of 1794. It may be doubted whether keeping theatres and places of public amusement open on Sundays might not be justified by the same line of argument. Many might be found, doubtless, who would affirm on oath that theatrical representations are conducive to mental and bodily health, and that such recreation as they afford is a necessity. Such a construction of the statute would make it but an empty sound. It would be losing sight entirely of the objects sought to be secured, the observance of a day of rest for the community, thereby **enabling every one to worship God according to the dictates of his conscience**, without distraction, and without disturbance, and thus giving a check to vice and immorality."

* * *

"Rest and quiet, on the Sabbath day, with the right and privilege of public and private worship, undisturbed by any mere worldly employment, are exactly what the statute was passed to protect: 10 Casey 398." (pp. 408-409, 423)

In *Commonwealth v. Nesbit*, 34 Pa. 398 (1859) the Court said:

"Let us inquire why people are forbidden to carry on their worldly business on the Sabbath? Our brother Woodward has already shown, that it is in order that people may devote the day to rest, and to the worship of God."

* * *

"How, then, is it possible for a Christian people to avoid protecting such a day and its institutions?

If there are men who oppose them as superstitions, let them at least respect them as essential constituents of the people's life, which cannot possibly be laid aside at will. If strangers to our institutions dislike these particular ones, let them accord a reasonable respect to us, and indulgence to our customs, and they will soon be reconciled to both, and find other matters more needing their reforming efforts."

* * * *

"On the other hand, **a special purpose of the day is, that people may enjoy religious worship and instruction**, and hence, the functions of the preacher, the religious teacher, the sexton, the organist, and the singers, are not forbidden, even though these persons engage in these employments as a means of livelihood. Hence, also, the ordinary means of attending public worship are not forbidden, when used purely for this purpose. In this view of the case, it is the rightness and the exigencies of the purpose that justify the ordinary means of effectuating it. Conducting and attending religious worship are among the very purposes for which the law protects the day, and therefore all the means which common usage shows to be reasonably necessary for these purposes, are not forbidden. . . ." (pp. 405, 406-407, 407-408)

In *Commonwealth ex rel. v. American Baseball Club of Philadelphia*, 290 Pa. 136, 143 (1927), the **last** time the Commonwealth's highest court spoke on the subject, the Act of 1794 was upheld on the ground that "**Christianity is part of the common law of Pennsylvania**[8]. . . **Sunday is the holy day among Christians.**"

8. Thomas Jefferson's study of the origin of this doctrine led him to the conclusion it was premised upon error:

"We have a curious instance of one of these pious frauds in the laws of Alfred. He composed, you know, from the laws of the Heptarchy, a digest for the government of the United Kingdom, and in his preface to this work he tells us expressly the sources from which he drew it, to wit, the laws of Ina, of Offa, and

The Attorney General of Pennsylvania in his brief filed in the baseball case admitted, indeed earnestly urged, that the Sunday Laws had religious significance:

Aethelbert (not naming the Pentateuch). But his pious interpolator, very awkwardly, *premises* to his work four chapters of Exodus (from the 20th to the 23rd) as a part of the laws of the land; so that Alfred's *preface* is made to stand in the body of the work. Our judges too have lent a ready hand to further these frauds, and have been willing to lay the yoke of their own opinions on the necks of others: to extend the coercions of municipal law to the dogmas of their religion, by declaring that these make a part of the law of the land. In the Year-Book 34, H. 6, p. 38, in Quare impedit, where the question was how far the common law takes notice of the ecclesiastical law, Prisot, Chief Justice, in the course of his argument, says, 'a tiels leis que ils de seint eglise ont, en *ancien scripture*, covient a nous a donner credence; car ces common luy sur quels touts manners leis sont fondes; et auxy, sir, nous sumus obliges de canustre lour esy de saint eglise,' etc. Finch begins the business of falsification by mistranslating and misstating the words of Prisot thus: 'to such laws of the church as have warrant in *holy scriptures* our law giveth credence.' Citing the above case and the words of Prisot in the margin, Finch's law, B. 1, c. 3, here then we find *ancien scripture*, ancient writing, translated 'holy scripture'. This, Wingate, in 1658, erects into a maxim of law in the very words of Finch, but citing Prisot and not Finch. And Sheppard, tit. Religion, in 1675 laying it down in the same words of Finch, quotes the Year-Book, Finch and Wingate. Then comes Sir Matthew Hale, in the case of the King v. Taylor, 1 Ventr. 293, 3 Keb. 607, and declares that 'Christianity is part and parcel of the laws of England.' Citing nobody, and resting it, with his judgment against the witches, on his own authority, which indeed was sound and good in all cases into which no superstition or bigotry could enter. Thus strengthened, the court in 1728, in the King v. Wollston, would not suffer it to be questioned whether to write against Christianity was punishable at common law, saying it had been so settled by Hale in Taylor's case, 2 Stra. 834. Wood, therefore, 409, without scruple, lays down as a principle, that all blaspheming and profaneness are offenses at the common law, and cites Strange. Blackstone, in 1763, repeats, in the words of Sir Matthew Hale, that 'Christianity is part of the laws of England', citing Ventris and Strange, *ubi supra*. And Lord Mansfield, in the case of the Chamberlain of London v. Evans, in 1767, qualifying somewhat the position, says that 'the essential principles of revealed religion are part of the common law.' Thus we find this string of authorities all hanging by one another on a single hook, a mistranslation by Finch of the words of

"Let us consider the Act of 1794, its purpose and express provisions as our Courts have interpreted and

Prisot, or on nothing. For all quote Prisot, or one another, or nobody. Thus Finch misquotes Prisot; Wingate also, but using Finch's words; Sheppard quotes Prisot, Finch and Wingate; Hale cites nobody; the court in Woolston's case cite Hale; Wood cites Woolston's case Blackstone that and Hale, and Lord Mansfield volunteers his own *ipse dixit*. And who now can question but that the whole Bible and Testament are a part of the common law? And that Connecticut, in her blue laws, laying it down as a principle that the laws of God should be the laws of their land, except where their own contradicted them, did anything more than express, with a salvo, what the English judges had less cautiously declared without any restriction?" (Letter, Jefferson to Adams, Jan. 24, 1814, COUSINS, IN GOD WE TRUST, pp. 257-9 (1958)).

In 1873, the Ohio Supreme Court, in *Minor v. Board of Education of Cincinnati*, 23 Ohio St. Rep. 245-247 wrote:

"We are told that this word 'religion' must mean 'Christian religion', because 'Christianity is a part of the common law of this country', lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a *law* of the state, like every other law, it must have a *sanction*. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition, that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people. And is not the very fact that those laws do *not* attempt to *enforce* Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they *are* the laws of a Christian people, and that their religion is the best and purest of religions? It is strong evidence that their religion is indeed a religion 'without partiality', and *therefore* a religion 'without hypocrisy'. True Christianity asks no aid from the sword of civil authority. It began without the sword and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. Armed with these, and these alone, it is not afraid nor 'ashamed' to be compared with other religions, and to withstand them single-handed. And the very reason why it is not so afraid or 'ashamed' is, that it is not the 'power of *man*', but 'the power of God', on which it depends. True Christianity never

construed them. **No opinion of this Court, however has failed to state and sustain its high and holy purposes in safeguarding the Christian Sabbath.**" Brief of Thomas J. Baldrige, Attorney-General of the Commonwealth of Pennsylvania (p. 22; see also pp. 25, 27, Ex. P-2, Rec. 47). (Bold face supplied.)

The Pennsylvania Supreme Court has also stated that religious doctrines form the basis for interpreting the Act: The Act prohibited "**the worldly employments . . . for the sake of the religious ones.**" *Commonwealth v. Nesbit*, 34 Pa. 398, 409 (1859). Other expressions by the courts of Pennsylvania which base and support these laws on religious grounds are cited in Plaintiff's Exhibits 2 through 8 (Rec. 47-48). In fact there is not one single court decision of the Commonwealth's highest court from 1853[9] to date

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shields itself behind majorities. Nero, and the other persecuting Roman emperors, were amply supported by majorities; and yet the pure and peaceable religion of Christ in the end triumphed over them all; and it was only when it attempted itself to enforce religion by the arm of authority, that it began to wane. A form of religion that can not live under equal and impartial laws ought to die, and sooner or later must die."

In short, the Biblical admonition: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." (St. Matt. XXII, 21)

9. There is reference to the day-of-rest idea in the earlier decision in 1848 in *Specht v. Commonwealth*, 8 Pa. 312 (1848). But even there the Court held that the purpose and motive of the Legislature in enacting the Act of 1794 was "to prohibit the profanation of a day regarded by them as *sacred*." (at p. 323). And Judge Coulter concurred at p. 327 on the ground that: "It guarded the Christian Sabbath from profanation, and, in the language of the act, prohibited work or worldly employment on the LORD'S DAY, commonly called SUNDAY; and not because of the mere usefulness of the day as a day of rest and cessation from worldly labour."

Moreover, in the earlier case of *Commonwealth v. Wolf*, 3 Sergeant & Rawle 48 (1817) the Court upheld the Act of 1794 on the ground that: "Laws cannot be administered in any civilised government unless the people are taught to reverse the sanctity of an oath, and look to a future state of rewards and punishments for the deeds of this life. It is of the utmost moment, therefore, that they should be **reminded of their religious duties** at stated periods." (p. 51)

which places the Sunday Laws on any basis other than the support of Christianity by honoring its holy day, the Lord's Day, and encouraging Christian religious worship.

Based upon this evidence, the findings of fact of the court below clearly are not erroneous. Indeed, they are the only findings which reasonably could be made. Two judges in courts of original jurisdiction in Philadelphia County have recently reached the same conclusion and declared the very Pennsylvania Sunday Law now before this Court to be unconstitutional. These opinions are printed in Appendices D and E hereof, pages 41a *et seq.* and 59a *et seq.*

Equally significant is the statement of the three-judge court in the Third Circuit in *Bargaintown, U. S. A., Inc. v. Whitman*, U. S. D. C. M. D. Pa., Civil Action No. 6760, now on appeal to this Court at Docket No. 76, October Term, 1960, a court which included Circuit Judge Hastie, also a majority member of the court below: "If the question involved in this case came to us as one of first impression, we would find great difficulty in upholding the constitutionality of the legislation in question." A three-judge court in *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *now on appeal to this Court*, at October Term, 1960, No. 11, reached the same findings by an examination of the Massachusetts law and Massachusetts decisions thereon, and held that a similar Massachusetts statute was unconstitutional.

On this record, the constitutionality of the Pennsylvania Sunday Blue Laws cannot be sustained, at least not in the absence of a compelling showing of great public necessity for their existence. *Thomas v. Collins*, 323 U. S. 516. This Court repeatedly has held that where freedom of speech or religion is affected, only in the case of compelling public necessity may a state be permitted to enact such laws. *Thomas v. Collins*, 323 U. S. 516, 530; see also *West Virginia Board of Education v. Barnette*, 319 U. S. 624; *Marsh v. Alabama*, 326 U. S. 501.

There was no evidence of such public necessity at the trial and the court below found none. In fact, it made it clear that it was upholding the constitutionality of the Pennsylvania Sunday Laws only because it felt constrained to do so by this Court's one sentence per curiam order in *Friedman v. New York*, 341 U. S. 907 (Rec. 282). And, as stated above, the Circuit Judge of the panel indicated elsewhere that but for this precedent, he would have had great difficulty in sustaining the statute. But that one line order does not bar this Court from making a present independent judgment regarding the constitutionality of the Pennsylvania Sunday legislation. This Court now has before it a finding of fact which completely destroys the assumption *Friedman* was based upon. Likewise *Soon Hing v. Crowley*, 113 U. S. 703, *Hennington v. Georgia*, 163 U. S. 299, and *Petit v. Minnesota*, 177 U. S. 164,[10] cited in *Friedman* by the state court, are irrelevant in the present case. All of these cases were decided prior to *Murdock v. Pennsylvania*, 319 U. S. 105, which was the first time that this Court protected First Amendment rights from state action through the Fourteenth Amendment.[11]

10. The actual issue in the *Soon Hing* case was whether an ordinance prohibiting washing or ironing clothes in public laundries between the hours of 10:00 P. M. and 6:00 A. M. or on Sunday was void on the ground that it constituted a discriminatory classification and was beyond the police power of the state under the Fourteenth Amendment. In *Hennington*, the issue was whether a state statute prohibited regulation of interstate commerce. In *Petit*, a law prohibiting the operation of barber shops on Sunday was challenged as an arbitrary classification under the Fourteenth Amendment.

11. The opinion in the *Murdock* case reversed the Superior Court of Pennsylvania, 149 Pa. Super. Ct. 175 (1942). Allocatur had been denied by the Supreme Court of Pennsylvania. The *Murdock* decision, which was a departure from earlier opinions of this Court, *cf. Prudential Insurance Co. v. Cheek*, 259 U. S. 530, 543, has been followed by this Court in many decisions without exception. Several lower courts have already re-examined the Blue Law issue and have determined that such laws conflict with the Fourteenth Amendment because of the religious nature of such laws. *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *on appeal* here, October Term, 1960, Docket No. 11. Two Philadelphia *nisi prius* courts, one in equity and one in a criminal

Appellees here may attempt to justify the Sunday Blue Laws on the specious contention that these laws are civil, not religious, legislation, and that their purpose is to provide a day of rest for the weary laborer. This argument has already been dismissed as unsound by Judges Magruder and Woodbury in *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher, supra*, 176 F. Supp. at pages 473-4, *now on appeal* at October Term, 1960, No. 11. Moreover, it is submitted that the findings of fact made by the court below foreclose this argument to the appellees.

Pennsylvania, as the court below found, has a well-developed pattern of rational rest laws, wholly distinct from the Blue Laws, which do not impinge upon the rights of conscience, but yet assure a day or more of rest a week.[12] Here there is a crazy quilt of exceptions to the Sunday Laws which indicates no real legislative interest in a day of rest for health's sake[13] as contrasted with a ceremonial day of religious honor. Appellees here have admitted that the health or welfare neither of appellant's employees nor of its customers is adversely affected by Sunday sales.[14] And,

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proceeding, have held the 1959 Pennsylvania Amendment unconstitutional: *Commonwealth v. Cavalerro and Levenson*, Court of Quarter Sessions, Misc. Div. (Alexander, J.), filed April 20, 1960, Phila. Legal Intelligencer, April 22, 1960; *Bargain City, U. S. A., Inc. v. Richardson Dilworth, Mayor of the City of Philadelphia, et al.*, Common Pleas Ct., Dec. Term, 1959, No. 1411, filed June 10, 1960 (Doty, J.), Phila. Legal Intelligencer, June 22, 1960. The findings of fact as to the religious nature of the law in both cases are in accord with those of the three-judge court here. The opinions are printed as Appendices D and E to this Brief.

12. See Findings of Fact Nos. 2, 3, and 5 (Rec. 290-2).

13. Finding of Fact No. 5 (Rec. 292).

14. Finding of Fact No. 2 (Rec. 292). On Rec. 36 the testimony is as follows:

"Q. You make no claim that anybody who is a clerk at Two Guys, from Harrison was being injured in either his health or his welfare by working on Sunday?

A. No.

Q. And likewise that people who made purchases there were not being adversely affected in their health and welfare by purchasing on Sunday?

A. No."

here too, is presented the situation where a person can, under the Blue Laws, work in a covered job for six days and in an exempt activity, such as baseball or transportation, for the seventh day, thus not achieving any day-of-rest objective. The only way to achieve the avowed purpose would be to provide that in every week each person must take at least one day of rest regardless of what business the person is employed in. And many states have adopted such one-day-in-seven rest laws. See *Sunday Laws*, 25 S. Calif. L. Rev. 131; 434 (1952). Judge Alexander has correctly pointed out that such laws generally can be and are enforced, as are the regular hour laws, fn. 13, *supra*, whereas the sporadic or discriminatory enforcement of the Sunday Laws is common knowledge. Appendix D, p. 46a, fn. 6; *cf. Martin v. Struthers*, 319 U. S. 141.

Appellees are also foreclosed from making the day-of-rest argument, for in Pennsylvania, as generally elsewhere, judicial justification of the Blue Laws had been precisely their religious nature, to preserve and defend this Christian nation.[15] Indeed, with such decisions as *Lochner v. New York*, 198 U. S. 45, then holding hour laws unconstitutional as an interference with freedom to contract, it was doubtful whether the Blue Laws could have been sustained as civil rest laws. It was only in recent years when the religious nature of the Blue Laws became constitutionally suspect that their faithful adherents took to supporting them as secular civil rest laws.

The history of the origin and development of the Blue Laws to this day, as the expert witnesses testified and the court below found, show indisputably that they are religious. And they are none the less religious even though vested economic interests—the center-city department stores—now rally to their defense in order to freeze a merchandising pattern into which a large segment of the working people of our country, as consumers and shoppers, do not want to be frozen. Many people want to shop in

15. See pp. 20-28, *supra*.

family groups, where they can park the family automobile, out of the high rent district, at the lowest possible price, without frills and fancy fashion "salons." Appellant wants to meet that demand.

"The manipulation of this religious sentiment by certain commercial groups, whose economic interests happen to coincide therewith, does not destroy the religious nature of the law" (Appendix D, p. 56a, fn. 21).

We are not met here with bona fide and essential civil laws, motivated rationally and substantially by the intent to preserve, in this world, the health and welfare of our citizenry, as we have in such laws as the compulsory vaccination, child labor and polygamy laws.[16] The court below found as a fact: "Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employes or customers of the store than does work on any other day" (Rec. 290). The two Philadelphia courts have made the same finding (Appendix D, p. 46a, fn. 6, Appendix E, p. 61a).

No clear or pressing civil danger faces the Commonwealth from which it can be saved only by invading the deep religious sensibilities of substantial numbers of its citizens.[17] Quite the contrary, the record here is clear that the Blue Laws had not been enforced at all in Lehigh County, Pennsylvania, from at least 1951 until appellant's

16. *See Jacobsen v. Massachusetts*, 197 U. S. 11; *Prince v. Massachusetts*, 321 U. S. 158; *Cleveland v. United States*, 329 U. S. 14.

17. The view of Jews toward compulsory observance by them of the Christian Sabbath or Sunday is set forth in the testimony of the expert witness, Dr. Hoenig, and the notes thereto, Appendix A, pp. 1a-9a.

The views of the Seventh Day Adventists appear from the testimony of the expert witness, Elder Odom, Appendix A, pp. 9a-11a, and from the memorandum which the General Conference of Seventh Day Adventists requested Appellant to submit with its brief to the court below, reproduced here as Appendix C to this brief, pp. 31a-40a.

In 1956 there were 252,544 Seventh Day Adventists and 6,435 Seventh Day Baptists in the United States, of which 7,248 and 146 respectively resided in Pennsylvania. STUDY BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES.

store opened in 1957, despite flagrant violations, and since 1951 it has been enforced against few people other than appellant (Rec. 218, 284-5, 98).

Appellees concede that there had been for many years a complete, deliberate and intentional lack of enforcement of the Sunday Laws in Lehigh County (Ex. P-9, Rec. 217-218). Lack of enforcement throughout Pennsylvania is notorious [18] and has long been recognized by the Pennsylvania Legislature:

> "The Pennsylvania Sunday Blue Law of 1794 is violated every Sunday by most people in our State. . . .
>
> "Who does not ride in his automobile on Sunday for pleasure? Who does not purchase candy, ice cream and cigars from candy shops on Sunday? Who does not ride in trolley cars, trains and buses on Sunday? Who does not purchase gasoline and oil on Sunday? Who does not use electric and gas on Sunday? And who does not use the telephone on Sunday? . . .
>
> "For years anyone with money enough to be a member of a club could play golf or tennis on Sunday morning or afternoon, with caddies working on Sunday during church service, and in the evening could attend a moving picture or theatrical show. . . ." Vol. 18, PA. LEGISLATIVE JOURNAL, Part IV, 1935, pp. 4644, 4645.

The defendant stipulated that for at least six years prior to the opening of plaintiff's store in late 1957, there was no enforcement of the Blue Law in Lehigh County, despite the regular Sunday operation of cement, automobile, steel and other manufacturing plants, public and

(CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES, ENUMERATION AND ANALYSIS BY COUNTY, STATE AND REGION) (1956).

In 1958 there were 5,261,550 Jews in the United States, constituting 3.04 per cent of the population. There were 442,200 Jews in Pennsylvania, 4.03 per cent of the population. AMERICAN JEWISH YEAR BOOK, p. 18 (1959), Vol. 60.

18. Rec. 222, 218, 115-116; Appendix E, *infra*, p. 67a.

private amusement parks, golf courses, both municipal and private, swimming pools, newspapers, radio and television stations, bowling alleys, and florists (Ex. P-9, Rec. 218, 222). There were over 100 retail establishments in Whitehall Township alone which were open on Sunday prior to the time defendant proceeded against plaintiff (Rec. 218, 150-1).

Establishments which have operated for years on Sunday, without any substantial interference from the District Attorney, include: the Bargain Center, an establishment similar in nature to the Appellant's store; Kleckner's TV and Appliance Store; drug stores with jewelry departments larger than that of plaintiff and with toy, clothing and camera departments; Nestor's Sporting Goods Store, advertised as the world's largest sporting goods store and selling, in addition, toys and clothing; the Bethlehem Steel Co.; Mack Truck Co.; Cement Mills; newspapers, television and radio stations; Fullerton Furniture Galleries; the "Home Show", a vast business promotional marketing show conducted on March 2, 1958, with a display and sale of products by some sixty business firms; a food market in the west end of Allentown with 50% of its floor space devoted to non-food items; greenhouses; bowling alleys; golf driving ranges; the local amusement park; the Allentown Municipal Golf Course; and a whole host of small stores which sell the same kind of items as are sold in plaintiff's store (Ex. P-9, Rec. 94, 108, 109, 110, 115-6, 133-4, 148, 163-166, 170, 172, 173). Three smoke shops were open, and a Dolly Madison Shop that sells dolls, gifts, ice cream and candy, and the Planters Peanut Shop (Rec. 104).

In addition to refusing to arrest those operating many of the above establishments, the District Attorney stated publicly on various occasions that he would not enforce the Blue Law against a number of activities clearly within its prohibition, including bowling alleys, the sale of Christmas trees, the operation of greenhouses and florist shops (Rec. 171-172, 150, 221-2).

II.

The Pennsylvania Sunday Laws, on Their Face, and as Enforced by Appellee McGinley, Are Unconstitutionally Discriminatory Since There Is No Rational Basis for the Distinction Between Legal and Illegal Activities Under Such Laws.

The court below made findings of fact which show the general discriminatory nature of the Pennsylvania Blue Laws (Rec. 290-92). The 1959 amendment to the Blue Laws, which is set forth verbatim at pages 3-4, *supra*, singles out only certain items, and prohibits only the retail sales of these items. The court below implied that the classification was "near whimsical" [19] (Rec. 283). The two Pennsylvania courts which have had occasion to interpret the statute have graphically noted the utter irrationality of the classifications contained therein, and the absence of any possible reasonable basis.

> "It seems clear that the statute in question is arbitrary and unreasonable on its face. The Act does not prohibit all commercial activity on Sunday but prohibits only sales **at retail.** Therefore, the Act in question permits a man to engage in the manufacture of clothing on Sunday but prohibits a man from selling that same article of clothing on Sunday. It permits a sale of furniture at wholesale on Sunday but prohibits a sale on Sunday of the same article of furniture at

19. The court below assumes that when this Court deals with economic legislation almost "anything goes" with respect to classification. We have demonstrated at pp. 39-40, *infra*, that this assumption is contrary to the actual decisions of this Court. It should be observed that the distinctions here involved affect personal liberty. The laws restrict the right of the employee to do an otherwise innocent act simply because it occurs on Sunday. Equally, it affects the individual freedom of the customer who otherwise would shop in the store on Sunday. Cf. *Murdock v. Pennsylvania*, 319 U. S. 105, 111; *State Athletic Comm. v. Dorsey*, 359 U. S. 533.

retail. We can see no valid reason or justification for the Legislature to draw a distinction between a retail sale and any other type of commercial activity. If the Act is designed to provide a day of rest for the citizens of this Commonwealth (even assuming that the Legislature could impose restrictions upon commercial activity on one particular day) it would certainly seem that employees of wholesale establishments, factories and service establishments need their rest as much as do employees of retail stores.

* * * *

"In addition, the New Sunday Blue Law does not prohibit the retail selling on Sundays of all goods and commodities but only prohibits the retail selling of certain enumerated articles and commodities and for this reason also, it is arbitrary and discriminatory. For example, one is prevented by the Act from selling a customer a toy for his child but not candy for his wife. The Act prohibits the selling of a rake, but not grass seed. The Act does not prohibit the sale on Sunday of a house which may contain all sorts of kitchen equipment but does prohibit the retail sale of a ten cent can opener to be used in the kitchen. We could multiply these illustrations a hundred-fold to point out the incongruity of the Act in this respect. We are at a loss to understand how these distinctions can be justified on the basis of a valid exercise of police power."[20]

* * * *

"The law prohibits the sale on one day of the week of commodities in general use, the sale of which has never been generally prohibited and indeed could not be, because in most instances they are necessities of life, viz: clothing, furniture and the like. What con-

20. Appendix E, *infra*; pp. 70a-71a.

ceivable purpose can such a law have? Nothing in the nature of the commodity itself requires that its sale be subjected to regulation. By way of illustration, it is not a narcotic, to be restricted to sale upon prescription. It is not alcohol, to be sold only to adults. It is not milk, to be sold only upon compliance with sanitary requirements. In short, there is nothing intrinsic in the nature of the items covered by the Sunday law which affords any rational, nonreligious reason for prohibiting their sale on Sunday, as against any other day.

"What then, is it about Sunday that can sustain the legislation? We pass for the moment the religious implication of the day, because if the law has a religious purpose, then, as pointed out below, it would be unconstitutional for that reason.

"The Commonwealth contends that the Sunday law is appropriate in order to assure a day of rest, that at least one day's rest in seven is a proper health or welfare measure, and that Sunday may be selected as that day because of the difficulty of enforcing a rest law which does not designate a single day upon which all citizens must refrain from work and rest. We may assume all this to be valid, although I doubt that it is."[a]

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[a] [6] For several reasons: (a) Pennsylvania, like the Federal Government and other States, has enacted a series of genuine labor laws covering comprehensively this subject. See, e.g., Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 Purd. Stat. § 103(a) (Women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended 43 Purd. Stat. § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 Purd. Stat. § 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 Purd. Stat. § 481 (employes of motion picture theatres must be given one day of rest per week). (b) Many States (Arizona, California, Oregon, Wisconsin and Wyoming) have one-day-in-seven rest laws (See Sunday Laws, 25 S. Calif. L. Rev. 131, 134), and I know of no problem in connection with their enforcement, or with the enforcement of the labor laws referred to in (a) above. Indeed, such laws generally are enforced, whereas

but it does not save this law because the instant classification is arbitrary. I do not predicate this conclusion upon the exclusion from the law of persons making wholesale sales and indeed, persons engaged in all other industrial or commercial activities generally, although I can ascertain no reason why they are in less need of rest than retail sales people. However, such distinctions, whatever they may lack in common sense, at least have the imprimatur of tradition, albeit in other contexts.[7]

"This law forbids a clerk to sell to my blind neighbor a Dylan Thomas *recording*, but does not prohibit the same clerk from selling me a *book* containing exactly the same poems from the next counter. Side by side in Bargain City and many other stores are *tricycles*, which cannot be sold to me for my two-year old granddaughter because they are toys, and adult bicycles which I can buy for myself or for my daughter just out of her teens. A clerk may sell me seat covers for my automobile, but he cannot sell me slip covers for my sofa. If I have forgotten to shop for a birthday present for my wife during the week, the same store may sell me on Sunday, without violating this law, a camera, ice skates or a dozen roses, but not a watch or a suitcase or a tie pin for myself. It cannot sell me a

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the sporadic or discriminatory enforcement of the Sunday laws is common knowledge, and tends to bring law enforcement generally into disrepute. (c) Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used, and mere ease of enforcing a more restrictive alternative will not sustain it. See, e.g., Kovacs v. Cooper, 336 U. S. 77, 88 (1949).

"[7.] It was argued by counsel for petitioners and not denied that some of the corporate interests supporting the "rest" law now at issue at the same time were attempting to get the Pennsylvania legislature to enact a law permitting bartenders to work in hotels on Sunday. It would seem to me that an overworked or tired bartender would do himself and his customers much more harm than a tired girl clerk selling slips as here complained of."

toy rubber football for the four-year old, but this law does not prohibit the sale of a football for the teenager, for one is a *toy* and the other is not, and *sporting goods* are not covered by this law.

"These examples could be multiplied endlessly by anyone strolling through Bargain City, a department store or a drug store with a copy of the law in his hand and the law must be kept in hand or exactly memorized, because there is no intelligible logical principle by which one may determine what is excluded and what is included. . . ."[21]

Such unreasonable and discriminatory classification is unconstitutional, denying to the plaintiff the equal protection and due process guarantees of the Fourteenth Amendment. Such classification fails to comply with this Court's requirement that "a statutory discrimination must be based on differences that are reasonably related to the purpose of the Act in which it is found." *Morey v. Doud*, 354 U. S. 457, 465; *Smith v. Cahoon*, 283 U. S. 553, 567; *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389; *Royster Guano Co. v. Virginia*, 253 U. S. 412; *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U. S. 194; *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550. In each of the cited cases this Court has followed the rule that:

". . . classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible."

21. Appendix D, pp. 45a-47a, *infra*.

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U. S. 389, 406.

In what manner does a sale at retail differ from a sale at wholesale justifying different legislative treatment? If these are day-of-rest statutes, do not employees of wholesale establishments, factories and service establishments need rest, too? What of rest for persons making retail sales of commodities not listed in the Act of August 10, 1959 as against those contained therein? And what policy exempts souvenirs and novelties? Why can a baseball player, or a bus driver work seven days a week, but a clerk selling household items only six days? What policy permits an employee to work six days at appellant's retail establishment, then take a job on Sunday at the local baseball park, or work as a substitute in the local newspaper plant? Certainly the finding of fact of the court below that work on Sunday is the same as work on any other day in appellant's store destroys completely any contention that there is a basis for the classification. In addition, the fact that Pennsylvania and other States have laws prohibiting work of various kinds for more than six consecutive days makes completely unnecessary a law which prohibits work for a small segment of the population on one particular day. The Pennsylvania law also lends itself to the abuse of good government with which this record is replete (See Rec. 289). Judge Volker in *People's Appliance & Furniture, Inc. v. City of Flint*, 99 N. W. 2d 522, 530 (Supreme Court of Michigan, November 24, 1959), has aptly stated:

> ". . . there exists a curious and rather widespread judicial reticence when our courts are dealing with so-called Sunday ordinances. The judicial approach then often seems to become gingerly to the point of timidity, as though the fact that, however invalid such ordinances may be when judged by ordinary standards, after all most Sunday ordinances are plainly on the side of morality and all right-thinking people and, if they should err, they do so on the side of the angels.

If such a tendency exists (and we trust we are wrong), we can only observe that an unreasonably discriminatory or otherwise invalid ordinance is no less bad because it happens also to please the pious. It is bad enough that Sunday ordinances should ever unreasonably discriminate between our people; it is doubly bad should there ever be any hint of judicial discrimination in their interpretation as against the accepted rules of interpretation applying to ordinary ordinances. Yet this apparent double standard is particularly evident in Michigan, as I shall presently undertake to demonstrate. One had not heretofore been sufficiently aware of the fact that in Michigan there are evidently Sunday standards for judging Sunday ordinances. I am now aware and I do not like what I see."

The Pennsylvania statutes deny due process since they bear no "real and substantial relation to the public welfare, safety, morals or some other phase of the general welfare." *Liggett Co. v. Baldrige*, 278 U. S. 105, 111-112. Their only justification is religion, which is, by its very nature, constitutionally infirm.

The Record makes it clear that appellee McGinley enforced the statute against appellant's employees in a wilfully discriminatory manner. The court below was incorrect when it held that such discrimination by a state officer does not violate the Fourteenth Amendment unless the discrimination or "classification" which results from the official's wrongful actions is one which the state Legislature could not have brought about (Rec. 285). This is not the law. It would be a complete abandonment of the fundamental concept that ours is a government of law, not of men, and would conflict with the decisions of this Court: *Mackay Telegraph & Cable Co. v. Little Rock*, 250 U. S. 94, 100; *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23. See *Yick Wo v. Hopkins*, 118 U. S. 356, 374; *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352.

This part of the case is not moot, although appellee McGinley is no longer in office. There are still pending criminal prosecutions against appellant's employees as the result of such discriminatory action. If it is here determined that appellee McGinley's conduct was unconstitutional, these criminal proceedings would have to be dropped. Cf. *People v. Harris*, Superior Court of California, June 10, 1960, 28 U. S. Law Week 2630.

III.

The Court Below Should Have Passed Upon the Constitutionality of the Act of 1794.

The Pennsylvania state court less than a year before the decision below had held that the Act of 1794 was applicable to appellant's employees, and appellee McGinley claimed in this Record that the Act of 1794 still applied to appellant (Rec. 275, 53-4). Appellant sells many items not covered by the Act of 1959, but covered by the language "all worldly employment" of the Act of 1794. In these circumstances it is clear that the doctrine of federal abstention, applicable where there is a possibility that a state court might interpret a state statute in such a way as not to apply it to the litigant, has no application. *Chicago v. Atchison, Topeka & Santa F. R. Co.*, 357 U. S. 77; *Public Utilities Commission v. United States*, 355 U. S. 534; *County of Allegheny v. Frank Mashuda Co.*, 360 U. S. 185.

At least the federal district court should have continued its injunction until the parties had a reasonable opportunity to have the state law question determined in the light of appellant's constitutional objections to the statute. *Doud v. Hodge*, 350 U. S. 485; *Harrison v. NAACP*, 360 U. S. 167, 178-79.

H.

Conclusion.

For the reasons stated above, the order of the court below should be reversed with instructions to enter an order declaring unconstitutional the Pennsylvania Blue Laws, including the Act of August 10, 1959, and the Act of 1794, and to issue a permanent injunction preventing the enforcement thereof.

Respectfully submitted,

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
LOUIS E. LEVINTHAL,
HARRY A. KALISH,
MORRIS EFRON,
OSCAR BROWN,
Attorneys for Appellant.

DILWORTH, PAXSON, KALISH, KOHN & DILKS,
Of Counsel.

Dated: October 4, 1960.

APPENDIX A.

The Expert Testimony.

Dr. Sidney B. Hoenig, an ordained Rabbi and Professor of History at Yeshiva University, an expert on the "inter-testimental" period—"from the destruction of the First Temple about 586 Before the Common Era until about the year 135 of the Common Era, and the Rabbinic Period beyond that, until about the Third or Fourth Century" (Rec. 58)—testified at length and without contradiction, that the Sunday Laws are religious laws.

He testified that until the end of the First Century both Christians and Jews observed the Sabbath on Saturday, the seventh day of the week (Rec. 59, 63). The New Testament clearly recognizes the Sabbath as being the seventh day of the week: "There are many references throughout the Gospels also of Jesus preaching in the Synagogue on the Sabbath Day . . ." (Rec. 59).

In the Second Century A. D., however, Christians and particularly those of Gentile origin, as distinguished from Christians of Jewish origin, determined to develop a religious day which would set them apart from the Jews (Rec. 67-8). It was decided, therefore, that Sunday should be considered as an additional religious holiday, to celebrate and honor the fundamental event of Christianity—the resurrection on Sunday of Jesus Christ. Thus, Sunday became known as the "Lord's Day," the day of the Resurrection of Jesus Christ (Rec. 63).[1] Christian religious

1. Reference to a standard King James Bible Concordance confirms the fact that Sunday celebration is based upon the Resurrection, not the Fourth Commandment. See A. J. Holman Company Bible of Philadelphia (1942), p. 129 of the Concordance; See also Rec. 95-96:

"Sabbath: The Rest day or seventh of the week; Gen 2:2, 3; became a Mosaic institution for rest and festal occasions; Ex 16:23-30; 20:8-11; Lv 19:3, 30; 23:3; 25:4-9; Dt 5:12-15; Day for Consulting Prophets; 2 K 4:23; A day of teaching and joy;

leaders wished to make Sunday the "choicest day of the week" (Rec. 70-1):

> "In other words, Sunday was a weekly resurrection, as Easter is the period of the annual resurrection, and it is associated with the Lord's Day of Resurrection generally." (Rec. 70)

But two centuries of purely religious activity failed to achieve the desired supremacy of Sunday over Saturday (Rec. 71), and so the Church turned to the State and first achieved enforcement of this Christian religious concept through the State in the reign of Constantine in 321 A. D., making Sunday by law a day of compulsory abstention from secular activities so that people would go to church to commemorate Christ's Resurrection (Rec. 66-8, 71).

The concept of the Resurrection and its compulsory commemoration by refraining from worldly activities is contrary to Jewish belief (Rec. 72-4). But more important, the State thereby forces the Jew to pay homage to the pivotal event and doctrine of the religion of another—the Christian, a doctrine which, rightly or wrongly, but without doubt, has contributed to the Jews' degradation in the past and to the feeling today that he is inferior and an alien.

For example, as Professor Hoenig pointed out, in the 15th Century every Christian was obliged to slap Jews on Easter (Rec. 71, 72):

> "Q. Why did the Church want the first day, or Sunday, as the day of rest?
>
> A. Well, I think it is natural to understand that the very fundamental and basis is the belief in Christ.

Neh 8:1-12; Hos 2:11; **Among Christians of the Third and Fourth centuries the day after the Hebrew Sabbath, the seventh day, gradually until well established was substituted for the Sabbath and called Sunday, the first day in commemoration of the resurrection of Christ; also by some called Lord's Day;** Our Lord's mode of observing the Sabbath was one of the main features of his life, which his Pharisaic adversaries most gladly watched and criticized." See also fn. 1, p. 5, *supra*.

Q. Was there at any time any activity, action or recommendation on the part of the Church specifically directed against Jews in connection with the observance of Easter or Sunday as the day of resurrection?

A. We do find in the course of Jewish history that when Easter came about, Easter Sunday especially, the Jew suffered immensely. In fact, it was the custom to take a Jew and to slap him on the Easter Sunday, until later on it was changed, and the Jew had to give a Jew's penny. That was all in commemoration of the resurrection. I quote here from a Social and Religious History of the Jews by Professor Baron, who mentions:

> 'During the Holy Week in particular the passion of Christ and His resurrection offered provocative themes of anti-Jewish assaults in theory and practice. We recall the need of special protective legislation and the frequent prohibition for Jews to appear in public streets less they further inflame the aroused passions.'

Q. Do you agree with the testimony which Dr. Solomon Grayzel of the Jewish Theological Seminary gave in a recent case summarized by a three-judge court[2] to the following effect: Dr. Grayzel cited the famous scene portrayed in Matthew 27, the trial of Jesus Christ before Pilate. He pointed out that as related in the Christian New Testament the Jews are portrayed as refusing to exchange Barabbas for Jesus but insisted upon crucifixion in spite of the attempts of Pilate to placate the mob. He cited the washing of hands by Pilate, and then the Verse 25: 'Then answered all the people and said, His blood be on us and our children.' Dr. Grayzel stated that this had been the cause of more anti-Jewish riots throughout the ages than anything else in history.

2. *Schempp v. School Dist. of Abington Township*, 177 F. Supp. 398 (E. D. Pa., 1959).

A. I fully agree with Dr. Grayzel's statement. In fact, I made a special study of this particular feature. I wrote a book on the Great Sanhedrin, the origin and development of the great court in the Second Commonwealth period, and it dealt with this element of the crucifixion, an historic angle (Rec. 72).

Professor Hoenig testified further:

"What is the attitude of the Jew with regard to the observance of Sunday?

A. Observance of?

Q. Of Sunday. What does it signify or symbolize to a Jew to be compelled by law to refrain from working on Sunday?

A. **If a Jew is compelled to observe the Sunday, if he is forced to observe the Sunday, it would be basically considered as forcing him to recognize the resurrection of Jesus.** He may be idle, that would be something else, but that does not in any way consider that he—the Bible tells us: 'Six days shalt thou work. Which means, according to Rabbinic interpretation, men should work on six days; he shall not be idle.

Judge Welsh: Would that forcing that you just referred to, Doctor, be considered as a forcing of a philosophical doctrine, or a physical command, or a political prohibition?

The Witness: **It would be the recognition of a theological doctrine which is forced upon the Jew if he is made to observe the Sunday.**" (Rec. 72-4)

He also testified that the phrase "Lord's Day" necessarily means the day of the Resurrection (Rec. 61, 62-4, 74), and he "would recognize that Sunday is associated with the Lord's day" (Rec. 82).

Finally, in answer to a direct question by the appellee he stated that the Amendatory Act of August 10, 1959 has

the same effect with respect to the religious controversy as did the earlier Sunday Laws (Rec. 79-82):

"Q. But, as a matter of fact, today, and recognizing the fact that the environment may consist of a preponderance of Christians, do you think that Jews today feel that they are being put upon because they can't work on Sunday?

A. I think they do.

Q. All Jews?

A. Most Jews do. I cannot speak for every Jew, because just as there are in the Christian faith so many minds and sects, so among Jews you have various opinions. Even in any school you have various opinions of different philosophers.

Q. So that at least there is among Jewish groups the opinion that it is perfectly all right not to work on Sunday regardless of whether or not the law exists?

A. **Yes, but they don't want to be compelled to observe the Sunday.** Every Jew, no matter whether he is of the extreme, wants to be allowed the full freedom. If he wants to work on the Sunday he shall not be compelled to say that he must observe Sunday."

This testimony is supported by many authorities in the Jewish tradition.

The Jewish Encyclopaedia[3] tells us that Jesus and his disciples kept the seventh day as the Sabbath, and that it was the author of the Epistle of Barnabas who adduced the occurrence of the Resurrection on the first day of the week as the reason for the observance of this "true day."

In discussing the first Sunday law enacted by Constantine, the writer in the Jewish Encyclopaedia states that it was this decree which "virtually sanctioned the recognition of Sunday as the sole day of rest, the 'Sabbath,' and thus **consummated the tendency that had been developing in the**

3. Vol. X, pp. 603-604. The article is by Emil G. Hirsch, noted Rabbi and Professor of Rabbinical Literature and Philosophy at the University of Chicago.

Christian church for nearly two centuries to substitute the day of Jesus' resurrection for the Jewish Sabbath. In this way Sunday was given an anti-Jewish significance in accordance with Paul's contention that the Resurrection abrogated the old dispensation and the Law." (Boldface supplied.)

To Orthodox Jews, who from time immemorial have regarded the sanctity of the seventh day of the week as the chief cornerstone of their religion, the Sunday law is particularly antipathetic. For them a governmental decree directing them to observe Sunday as the day of rest is a reminder not only of what their ancestors throughout the Middle Ages endured by reason of the formidable power of the combination of Church and State, but that they are still a minority in a Christian country, enjoying by sufferance a status something less than full and equal citizenship. And certainly this may be expected to cause in them "a feeling," to borrow a phrase from the Chief Justice of the United States used in another, but apposite context, "of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education of Topeka*, 347 U. S. 483, 494.

For an account of how the Christian Church's celebration of Holy Week *often* caused the state to take harmful action against Jews, see MALCOLM HAY, "THE FOOT OF PRIDE," (1950) 102-104, 88-89, 36-37; GRAYZEL, "THE CHURCH AND THE JEWS," pp. 304-305, 316-317, 332-333, 334-335.

The original Constitution of the United States, with its stipulation that no religious test should be required as qualification for any public office or post of trust, marked the dawn of the modern era of Emancipation of the Jews.[4]

4. It was not until September 27, 1791 that for the first time in the history of modern Europe the Jews of France were formally admitted as equal citizens of the country of their birth. ROTH, "HISTORY OF THE JEWISH PEOPLE," p. 341.

The beginning of the Bill of Rights: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof," was hailed by the Jews as the first attempt to guarantee the separation of church and state, and to end temporal interference with religious liberty.

It is easy to understand, therefore, why American Jews have been alarmed by such occasional judicial utterances as "this is a Christian nation,"[5] and "Christian religion is a part of the common law of Pennsylvania."[6]. The concept of Pennsylvania as "a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor," is the true basis of the decision upholding the constitutionality of the Sunday law of 1794 in *Specht v. Commonwealth*, 8 Pa. 312 (1848).[7] The reaction on the part of the Jews to the idea that Sunday laws are valid because this is a Christian commonwealth was forcefully expressed in "The Occident and American Jewish Advocate," the monthly periodical edited by Issac Leeser, the outstanding spiritual leader

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5. *Church of the Holy Trinity v. U. S.*, 143 U. S. 457, 471.

6. *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, 198.

7. Justice Coulter's concurring opinion clearly presented the actual, rather than the pretended, basis for the Sunday law: "I wish it to be distinctly understood that I believe the laws constitutional, because they guard the Christian Sabbath from profanation, and, in the language of the act of 1794, prohibit work or *worldly* employment on the *Lord's Day*.

"We are a Christian people and state; we are part and parcel of a great Christian nation. All over the length and breadth of this great nation, the Christian Sabbath is recognized, and guarded by the law as a day of sacred rest.

"It was one of the primitive institutions of Christianity—one on the existence of which its continuance depends. General Christianity enters into the very frame of our social existence; it is a part of the common law of the state. Law and order springing from the same source, the bosom of the Almighty, lean upon it for support. Our memories of the past—our hopes of the future are dependent upon it. Why then should the Supreme Court not regard it, as our forefathers regarded it, and as the statute declares it to be—the Lord's Day?"

and spokesman of the Jewish people during the middle of the nineteenth century. Writing of "the fiction of a Christian State,"[8] Leeser declared: "It so happens that Christians in America have precisely such a hankering for dominion which the Constitution under which we live especially denies them; and the only way they contrive to keep alive this feeling, this inordinate love for power, is by pretending to believe in the existing of no other persons in the Commonwealth than themselves, the Christians . . . We must therefore think it very bad taste indeed, to call it nothing worse, that when religion or religious observances are spoken of, to forget altogether that there are other religionists than Christians, and other observances than those founded on their system of faith. We contend that we are a part of the commonwealth; as much citizens as all others; equal in the eye of the law, being so by the spirit *and* letter of the constitution."

In commenting upon "the retrograde movement lately attempted in various parts of the United States" to enact Sunday laws, Leeser stated "that the Courts could not be depended upon for a certainty to decide in favor of what is right; but they would, in all probability, be biased by their own or the public opinion on religion." After the Supreme Court of South Carolina handed down its opinion in the case of *City Council v. Benjamin*,[9] and shortly be-

8. In November 1848 "Occident", vol. 5, p. 403, in connection with the Governor's Thanksgiving Proclamation. Leeser was the most distinguished Rabbi in America in his day, and a vigorous proponent of liberalism. WOLF AND WHITEMAN, HISTORY OF THE JEWS OF PHILADELPHIA (1954), p. 373.

9. 2 Strobhart's L. Rep. 508, at p. 521 (S. C. 1848). The opinion of Judge William Rice in the 1846 Term of the City Court, in favor of Benjamin is interesting. He wrote:

> "In a community where there is a complete severance between Church and State, and where entire freedom of religious faith and worship is guaranteed to all its citizens alike, without discrimination or preference, the observance of any particular day, in a religious sense, is a matter of mere ecclesiastical or religious discipline and authority, and in no way pertaining to the civil

fore the *Specht* case was decided, Leeser wrote: "We deeply lament that our prognostications were so completely verified." He denounced "the fallacy" that Christianity is by the common law the law of the land, and he declared that "all decisions of courts and juries, based upon such an assumption, must ultimately be reversed by the Supreme Court of the United States, or by the sure action of public opinion. In the meantime we can wait, and watch well the progress of events, not doubting that the *right* will triumph at last." [10]

Elder Robert L. Odom, an editor and historian of the Seventh Day Adventist Church (Rec. 83), confirmed Professor Hoenig's testimony with respect to the origin and present purpose and effect of the Sunday observance laws (Rec. 84-87). He forcefully evidenced the severe hardship and handicap occasioned Seventh Day Adventists and others similarly situated (such as Seventh Day Baptists and Seventh Day Church of God (Rec. 90)) by laws which require the cessation of work on Sunday:

> "Q. What is the position of yourself and your faith, the Seventh Day Adventists, with regard to a law which requires you to observe Sunday by refraining from work; and, if you need, give an explanation as to why.
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> * * *

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power or legislative authority of the State, . . . Is it no discrimination or preference, to select by the civil law of the State, the day considered sacred in a religious sense by the Christian, and to compel the Jew to unite externally, at least, in its observance; to protect from possible disturbance those who worship on that day, by requiring all others to abstain from every species of labour and employment, while the Jewish Sabbath is protected by no similar regulation? In the view of the constitution, are not the Jewish Sabbath and the Christian Sunday precisely equal, and those who worship God upon one or the other day, entitled to a perfect equality of immunity and privileges? . . . ." 2 Strobhart's L. Rep. 508, at p. 512; see *The Occident*, IV March, 1847, pp. 558-595.

10. "THE OCCIDENT", Vol. 6, pp. 39-40 (April 1848).

A. Our principal objection is this, and we believe that it is Christian and historically American: That force, coercive, compulsory measures should never be used to compel any people to observe religious days under any pretext whatsoever.

We believe that that was the mistake that was made by Constantine, the six Sunday laws that set the precedent for it, because these things very often are like the camel's nose. If the state can step in and say, now, here are the Jews, and the Seventh Day Adventists, the Seventh Day Baptists, the Seventh Day Church of God, and a number of others that I could mention—in Washington, D. C., we have two Moslem Temples where they observe Friday, or at least some of their followers do, because that is the day of assembly in the Moslem world. If the state steps in and dictates that everybody, regardless of creed or race or conviction shall rest upon that day, we feel, first of all, that the individual is being denied a God-given right to work six days, to do his work within six days; that that is in the commandment. Then another——

Q. What is in the commandment?

A. In the Fourth Commandment of the Decalogue: Six days shalt thou labor and do all thy work.

That we are denied that privilege.

Furthermore, an objection that we have is that after we have devoutly kept ourselves, paid our taxes to support this Government, to support these courts, to support these law enforcement officers, our Congressmen, our President, and all of that, we feel that it is unjust to compel us to observe the day of rest of **another segment of Christianity, and be put in a category of second-class citizens.**

In other words, we are being denied a privilege of laboring six days, whereas the other group can work the first five days of the week, and then open full-

wide—and we have no objection if they do it. But open full-wide on our holiday of rest and carry on.

We believe that under the law we are created equally entitled to just consideration, and any Sunday law that allows no exemption and provides nothing of the kind—as the Pennsylvania Sunday Law does—is an injustice, because besides denying us the God-given right of working six days a week we are compelled to lose one day out of every fifty-two weeks of the year of work, and therefore nearly 17 per cent of our income, and our children, our babies, our wives and just as precious in the sight of our Saviour and our God as the wives and children of others; they need to eat, they need their shoes. **And why should we be placed in a category of second-class citizens?**

If we keep our holy day we are penalized by being deprived of one day's work, one day's income; if we violate the law then we are fined up into hundreds of dollars and perhaps imprisoned.

So we regard this whole thing as unjust and we feel, furthermore, that it is wrong." (Rec. 89-91) (Bold face supplied.)

The evidence of Dr. Odom was not contradicted.

APPENDIX B.

Christian Religious and Lay Writings Regarding Sunday as a Religious Day Honoring the Resurrection.

Christian religious and lay authorities likewise have recognized the significance of Sunday as the weekly commemoration of the Resurrection, and the compulsory abstention from work as a symbol of honor to and faith in this pivotal Christian religious tenet.[11]

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11. Reference to a standard King James Bible Concordance confirms the fact that Sunday celebration is based upon the Resurrection, not the Fourth Commandment. See A. J. Holman Company Bible of Philadelphia (1942), p. 129 of the Concordance:

> "Sabbath: The Rest day or seventh of the week; Gen 2:2, 3; became a Mosaic institution for rest and festal occasions; Ex 16:23-30; 20:8-11; Lv 19:3, 30; 23:3; 25:4-9; Dt 5:12-15; Day for Consulting Prophets 2 K 4:23; A day of teaching and joy; Neh 8:1-12 Hos 2:11; **Among Christians of the Third and Fourth centuries the day after the Hebrew Sabbath, the seventh day, gradually until well established was substituted for the Sabbath and called Sunday, the first day in commemoration of the resurrection of Christ; also by some called Lord's Day;** Our Lord's mode of observing the Sabbath was one of the main features of his life, which his Pharisaic adversaries most gladly watched and criticized."

The word "Sabbath" is derived from the Hebrew *"shabbath,"* meaning day of rest. WEBSTER'S NEW INTERNATIONAL DICTIONARY (Merriam 2nd Ed. unabridged, 1955), p. 2191.

The following appears, inter alia, in the same dictionary with regard to the word "Sunday", at page 2528: "The first day of the week, regarded by most Christians as a day for rest from secular employments and for religious worship; the Christian Sabbath; the **Lord's day.** It is kept as a weekly commemoration of the **day of Christ's resurrection** and as the Christian analogue of the Jewish Sabbath. SUNDAY, SABBATH are not strictly synonymous terms. Sunday is the name of the first day of the week; Sabbath designates the institution rather than the day, and is synonymous with **Sunday** only in Christian usage, inasmuch as the Jewish **Sabbath** falls on Saturday. As a designation of the day, **Sunday** is preferred to **Sabbath.**"

In AMERICAN MAGAZINE, the NATIONAL CATHOLIC WEEKLY REVIEW, Vol. 91, pages 517-518, August 28, 1954, James M. Shea, who is an editor of the Cincinnati Catholic Telegraph Register, traced the history of Sunday observance. The article states that St. Justin explained to the Pagans of Rome that "the day of the sun is the day of our common assembly to begin with because it is the first day, the day on which God transformed darkness, but we assemble on this day above all because this is the very day Jesus Christ our Saviour rose from the dead."

The article also quotes the following from St. Augustine:

"This seventh day shall be our Sabbath, whose end shall not be the evening, but the Lord's day, as the eighth eternal day which is consecrated by the resurrection of Christ, prefiguring the eternal rest not only of the spirit but also of the body."

In another work it is stated:

"Nearly all the States have laws enforcing the observance of Sunday as the Sabbath, and not unfrequently individuals are arrested and fined for doing work or indulging in amusements on that day, when their acts in no way disturb others. If the State is independent of the Church, what right has it to require the observance of one day as a Sabbath more than another? And how can it punish any man for doing work at any time, when he does not thereby infringe on the rights of other members of society? The judicature of the country is disgraced, so long as our courts serve as tribunals for such sectarian purposes." *The Practical Separation of Church and State, B. F. Underwood* (1876), in BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA (1949), p. 214.

Blackstone was of the same opinion. For example, in the ninth edition of his COMMENTARIES ON THE LAWS OF

ENGLAND (1783), Vol. IV, he classifies in Chapter 4, under the heading "Offenses Against God and Religion": those offenses "which are more immediately injurious to God and his holy religion (the Established Church of England)". He writes:

> "Profanation of the lord's day, vulgarly (but improperly) called **Sabbath-breaking** is a ninth offense against God and religion, punished by the municipal law of England. . . . the laws of king Athelstan forbad all merchandising on the lord's day, under very severe penalties. And by the statute 27 Hen. VI. c. 5. no fair or market shall be held on the principal festivals, good friday, or any sunday, (except the four sundays in harvest) on pain of forfeiting the goods exposed to sale. And, since by the statute 1 Car. I. c. 1. no person shall assemble, out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear baiting, interludes, plays, or other *unlawful* exercises or pastimes; on pain that every offender shall pay 3s 4d to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the lord's day, after divine service is over. But by statute 29 Car. II. c. 7. no person is allowed to *work* on the lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings." (pp. 63-64)

In THE SURVEY MAGAZINE, Vol. 26, page 854, September 16, 1911, a leading article entitled "*A Challenge to the Church*" written by John A. Fitch stated:

> "Sunday laws in the United States were put on the books through the efforts of churchmen. They

are no more rest-day laws, these restrictions that have come down in America from colonial days; like the fourth Commandment of the Mosaic law, they are designated to protect the Sabbath from desecration. They do not generally designate the day of rest as 'Sunday' but as 'the first day of the week, commonly called the Sabbath' and one state at least described the day as 'the Sabbath, commonly called the Lord's day.'"

As is stated in Hitchler, *The Legal Crusades of the Sabbatārians*, 32 DICK. L. REV. 129, 138 (1928):

"The motive of those who enacted the Sunday law was unquestionably to prohibit the profanation of a day regarded by them as sacred, and even if this were not the motive, the effect of the law was to give a preference to one religious sect over others. The law was passed in pursuance of the idea that Christianity should be specially favored by law. Its purpose was to protect the Christian Sunday from desecration and it favors the Christian religion to the exclusion of others." (p. 138)

Nor are these views confined to opponents of Sunday laws. Quite the contrary, some of the most vigorous expressions of the religious nature of these laws have come from their staunchest advocates, including the Lord's Day Alliance:

"Our civil laws are necessary to protect the church in her opportunity on this day . . . The State by its laws declares secular labor or secular amusements on Sunday to be a misdemeanor or a crime, punishable by a fine or imprisonment or both. Thus the State helps to keep alive in the conscience of the people the unique and sacred character of the day. **This aids religion** because it helps to maintain throughout the day a moral atmosphere favorable to

church-going and the performance of religious duties. Thus the State, while not commanding the religious observance of the day (it must not do this), commends it.

"If the people properly observe the Sabbath, they will be found in the House of God on that day. Remove these counter-attractions and distractions of the day and it will prove far easier to woo and win back the multitude of young people who have lost their way to the Bible School and the church. Close up the Sunday movies, shut the gates of the baseball parks, lock the doors of many open places of business, make more attractive though nonetheless spiritual the meetings of the church, and this paramount problem of the churches will be well on the way to a definite solution.

* * *

"All we demand is that the church be safeguarded in its fundamental rights to be free from disturbances and from distractions, and that temptations to break the Sabbath be withdrawn from the people . . . I feel that the time has come when the church must make the Sabbath so sweet and wholesome that all roads on Sunday will lead to church." AMERICAN MERCURY, May, 1928, Vol. 14, pp. 91-98, quoting from a pamphlet distributed by the Lord's Day Alliance and from a statement by Rev. Harry Laity Bowlby, General Secretary of the Lord's Day Alliance.

In 1829, when the agitation against Sunday mail had reached its peak, the Congress of the United States specifically rejected the demand it be discontinued, on the ground that to bow to it would violate the First Amendment:

"Should Congress, in their legislative capacity, adopt the sentiment, it would establish the principle

that the Legislature is a proper tribunal to determine what are the laws of God. It would involve a legislative decision in a religious controversy, and on a point in which good citizens may honestly differ in opinion, without disturbing the peace of society, or endangering its liberties. If this principle is once introduced, it will be impossible to define its bounds. Among all the religious persecutions with which almost every page of modern history is stained, no victim ever suffered but for the violation of what Government denominated the law of God. To prevent a similar train of evils in this country, the constitution has wisely withheld from our Government the power of defining the divine law. It is a right reserved to each citizen; and while he respects the equal rights of others, he cannot be held amenable to any human tribunal for his conclusions.

"Extensive religious combinations to effect a political object are, in the opinion of the committee, always dangerous." SENATE DOCUMENT, 20TH CON., 2D SESS., REPORT NO. 46; see MARK, THE FAITH OF OUR FATHERS (pp. 272-273).

In his Memorial to the Massachusetts Constitutional Convention in 1853; John Barnes stated:

"We submit, that all laws for enforcing the observance of the Sunday are projected upon a religious creed; that Constitutional authority, therefore, is a direct Constitutional establishment of religion; and we hold that such establishment is contrary to every principle of a free government; that the State can only enforce the creeds of any church, or the observance of any religious ceremonial, but by sacrificing its democracy, and becoming 'an engine of combined clerical and political usurpation.'" MARK, THE FAITH OF OUR FATHERS, p. 286.

Divergent Christian Religious Doctrines as to the Proper Observance of Sunday.

The divergence of religious views on Sunday Laws is not solely between Jews or seventh day Sabbatarians on one hand and Christians on the other. The precise type of Sunday observance to be incorporated into law has long been a subject of controversy between Catholic and Protestant, and among Protestant sects, sometimes of bitter controversy.

The following is quoted from a book written in 1845 by a Philadelphian, William Logan Fisher, HISTORY OF THE INSTITUTION OF THE SABBATH DAY,[12] pp. 63-66:

> "As the Puritans gained power in England, the whole nation became convulsed with the most frivolous disputes. It was not only the great leading doctrine, 'That saving grace is not given, or communicated, to all men, and that those who are not predestinated to salvation, shall necessarily be damned,' that distracted the country, but the government itself was thrown into violent convulsions respecting the use of the surplice, the rails placed about the altar, the ring in marriage, the cross in baptism, and other rites which Hume calls mean and contemptible. But they were not contemptible, if they involved *principle*.
>
> "By the Puritan book of discipline, the minister was not allowed to baptize children by the names of Richard, Robert, &c., which savoured of paganism: they were to use Scripture names such as Obadiah, Zephaniah, Hezekial, &c., which are so common among the descendants of the Puritans at the present day: and to the same source are we indebted for such names as Deliverance, Virtue, Fear, Hope, Charity, Thankful,

12. An indignant reader has written the epithet "an infidel" across the title page of the copy in the Library Company of Philadelphia. Such unintentional betrayal by advocates of Sunday Laws of their feeling that the issue is fundamentally religious is significant, as are the letters to newspapers and the rather more abusive anonymous letters to appellant's counsel.

Consolation, Praise God, The Lord is Near, and a variety of others of the same character. The three first children that were baptized in Boston church, were named Joy, Recompense and Pity.

"It was Doctor Bound, one of the rigid Puritans, who applied the name Sabbath to the first day of the week, about the year 1595. He published a book upon the occasion, particularly decrying the Romish festivals, in which he stated that the church of Rome had joined many other days to the seventh day, making them equal, if not superior, as well in the solemnity of divine offices, as in restraint from labour; that the commandment for sanctifying every seventh day in the Mosiac Decalogue, is natural, moral and perpetual, and that the church had no authority to sanctify any other day.

"This new Sabbath doctrine, as it was called, of Bound's, met with violent opposition from the Episcopal and other churches. Archbishop Whitgift condemned the book, and Rogers, another clergyman, said, 'that it was the comfort of his soul, and would be to his dying day, that he had been the man and the means that the Sabbatarian errors were brought to the light and knowledge of the state.' To counteract this doctrine, the book 'concerning lawful sports, to be used on Sundays after divine service,' which had been heretofore issued, was republished by king Charles I., with an order that it should be circulated through all the parish churches. This allowed of all kinds of diversions on Sunday; and the king declared, that it was done 'out of pious care for the service of God, and for suppressing of those humours that oppose truth, and for the ease, comfort, and recreation of his majesty's well deserving people.' The bishops recommended these recreations, 'as bringing the people more willingly to church, as tending to civilize them, and to compose differences among them, and as serving to

increase love and unity.' The Puritans were of a different mind, and violently opposed them; many of the clergy refused to read the king's orders in their churches. The animosity was very severe, and was carried on for many years. The whole argument of the Sabbatarians, seemed to rest upon the Mosiac code. It serves to show the error of trying to make the consciences of men depend upon state laws. What is sanctioned in one age is condemned in another, from the particular caprices of those who may happen to be in power.

"It is stated that every passage in the Bible, whether relating to the legal Sabbath, or to the spiritual Sabbath of the soul, was tortured to prove their position; and it was carried to such a length, that chief justice Popham commanded these books to be called in, and neither be printed nor made public for time to come.

"This is believed to be the origin of the term Christian Sabbath, a name which has not generally been adopted among Christians, and it ought never to be adopted, because, applied to a day, it is a falsehood.

"**The Puritanical zeal upon the subject, appears to have had no other foundation than the attempt to gain power by destroying festivals which were sustained by the Romish and Episcopal churches.** Pretending to consider themselves peculiarly the church of Christ, their fanaticism was directed against every thing which they had not themselves created."

To the same effect is a more recent and comprehensive study by a churchman and proponent of the modified Sunday law, STOKES,[13] CHURCH AND STATE IN THE UNITED STATES, Vol. III, pp. 154-156, 157-158, 168-169:

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13. Doctor of Divinity, former Secretary of Yale University and Canon of Washington Cathedral.

"In 1828 a general union for the observance of the Sabbath had been organized in New York. In 1844 a National Sabbath Convention was held in Baltimore, attended by 1,700 delegates from eleven states, with the Honorable John Quincy Adams (1767-1848) presiding. Dr. Justin Edwards (1787-1853) was the effective secretary of the American and Foreign Sabbath Union (founded in 1842), which was the main support of this movement. He was the author of the broadly distributed 'Permanent Sabbath Documents', and was a typically sincere but somewhat narrow Protestant reformer of the time, interested especially in temperance, tract distribution, Sunday observance, and Christian education.

"This effort was due largely to the dangers which seemed to conservative Protestants to threaten the country, on account of the large immigration from Europe of a population accustomed to what is generally called the continental Sunday. Other factors contributed, such as the development of railroads, with Sunday railroad schedules; the growth of Sunday newspapers; and certain forms of Sunday entertainments. But the immigration situation, especially in the large cities of the East, was uppermost in the minds of those who called the National Sabbath Convention.

"It must not be thought, however, that they represented all the intelligent public opinion of religious people in the country. Many persons sympathetic with the Christian traditions of the nation believed that Sunday legislation, especially in any rigid form, was contrary to the fundamental principles of Church and State separation on which the nation was founded. They felt that Sunday observance was an individual matter, not one for municipalities, state legislatures, and Congress to deal with.

"A remarkable expression of this view was by William Lloyd Garrison (1805-79). It was in the form of an appeal in 1848 for an American Anti-Sunday Law Convention. It was a direct reaction to the National Sabbath Convention of 1844 and the work of the American and Foreign Sabbath Union. As Garrison's appeal sums up effectively the view of most opponents of Sunday legislation, and as it is little known, it is here reproduced at some length.

"*To the Friends of Civil and Religious Liberty:*

'The right of every man to worship God according to the dictates of his own conscience is inherent, inalienable, self-evident... Yet it is notorious that, in all the States, excepting Louisiana, there are laws enforcing religious observance of the FIRST DAY OF THE WEEK AS THE SABBATH, and punishing as criminals such as attempt to pursue their usual avocations on that day,—avocations which even Sabbatarians recognize as innocent and laudable on all other days. It is true, some exceptions are made to the rigorous operation of these laws, in favor of the Seventh-Day Baptists, Jews, and others who keep the seventh day of the week as the Sabbath; but this freedom is granted in condescension to the scruples of particular sects, as a privilege, and not recognized as a natural right. For those (and the number is large, and steadily increasing) who believe that the Sabbath was exclusively a Jewish institution,—"a shadow of good things to come", which vanished eighteen hundred years ago before the light of the Christian dispensation, and therefore that it constitutes no part of Christianity,—there is no exception from the penalty of the law; but, should they venture to labor even for bread on that day, or be guilty of what is called "Sabbath desecration", they are liable either to fine or imprisonment!... Cases of this kind

have occurred in Massachusetts, Vermont, Pennsylvania, and Ohio, within a comparatively short period, where conscientious and upright persons have been thrust into prison for an act no more intrinsically heinous than that of gathering in a crop of hay, or selling moral or philanthropic publications. There is, therefore, no liberty of conscience allowed to the people of this country, under the laws thereof, in regard to the observance of a Sabbath day.

'In addition to these startling facts, within the last five years a religious combination has been formed in this land, styling itself "THE AMERICAN AND FOREIGN SABBATH UNION", whose specific object it is to impose the Sabbatical yoke yet more heavily on the necks of the American people. In a recent appeal made for pecuniary assistance by the executive committee of the Union, it is stated that "the Secretary (Rev. Dr. Edwards) has visited twenty of the United States, and traveled more than thirty thousand miles, addressing public bodies of all descriptions, and presenting reasons why, as a nation, we should keep the Sabbath,—all secular business, traveling, and amusement be confined to six days in a week,—and all people assemble on the Sabbath, and worship God." A "permanent Sabbath document" has been prepared by the Secretary; and "what has already been done will put a copy of this document into more than three hundred thousand families." Still greater efforts are to be made by the "Union" for the furtherance of its object.

'That this combination is animated by the spirit of religious bigotry and ecclesiastical tyranny—the spirit which banished the Baptists from Massachusetts, and subjected the Quakers to im-

prisonment and death, in the early settlement of this country—admits of little doubt. It is managed and sustained by those who have secured the enactment of the penal laws against Sabbath-breaking (all that the spirit of the times will allow), and whose disposition it manifestly is, if they can increase their power, to obtain the passage of yet more stringent laws against those who do not "esteem one day above another," but esteem "every day"—who are not willing that any man shall judge them "in respect of a holy day, or of the new moon, or of the Sabbath"—and who mean to "stand fast in the liberty wherewith Christ hath made them free, and not to be entangled again with the yoke of bondage." Its supporters do not rely solely upon reason, argument, persuasion, but also upon brute force—upon penal law; and thus in seeking to crush by violence the rights of conscience, and religious liberty and equality, their real spirit is revealed as at war with the genius of republicanism and the spirit of Christianity.

'Believing that the efforts of this "Sabbath Union" ought to be baffled by at least a corresponding energy on the part of the friends of civil and religious liberty; . . .

'We, the undersigned, therefore, invite all who agree with us essentially in these views of the Sabbath question, to meet IN CONVENTION, in the city of Boston, on THURSDAY and FRIDAY, the 23rd and 24th of March next, to confer together, and to decide upon such measures for the dissemination of light and knowledge, on this subject, as may be deemed expedient.

'In publishing this call for an ANTI-SABBATH CONVENTION, we desire to be clearly understood. We have no objection either to the first or the

seventh day of the week as a day of rest from bodily toil, both for man and beast. On the contrary, such rest is not only desirable but indispensable. . . .

'We are aware that we shall inevitably be accused, by the chief priests, scribes, and Pharisees of the present time, as was Jesus by the same class in his age, as "not of God", because we "do not keep the Sabbath day"; but we are persuaded that to expose the popular delusion which prevails on this subject is to advance the cause of a pure Christianity, to promote true and acceptable worship, and to inculcate strict moral and religious accountability in all the concerns of life, ON ALL DAYS OF THE WEEK ALIKE. . . .'

"It is doubtful whether the proponents of Sunday legislation produced as able a document. They seem to us to have been right in wishing to preserve the spiritual values in the weekly day of rest, but wrong in wishing to accomplish their purpose through rigid legislation to bulwark the inherited mores and religious teachings.

"From the time of this controversy the 'Sunday question' has been prominent, especially in states with a large Roman Catholic urban population wishing to have the laws relaxed; and a well-organized Protestant group, generally led by Presbyterians, Methodists, and Baptists, determined not to permit any change which would bring in the wide-open 'Continental Sunday'. The fight has been long and stubborn, with the liberal forces gradually gaining ground.

* * * *

"The typical Catholic and Protestant conceptions of Sunday laws and Sunday observance differ considerably. The Catholic is more liberal, though both, as a matter of theory, place almost equal emphasis on

church attendance. The Catholic emphasis is more definitely on worship—the mass—less on preaching; and the Roman Catholic is much more successful in transforming theory into practice in this matter. Probably more than three-quarters of Roman Catholics in the United States attend Sunday mass fairly regularly, while outside of villages and small towns and the rural South few communities show half as large a proportion of Protestant worshipers.

"The difference is the more striking in the matter of Sunday observance laws. Though both groups lay equal emphasis on the rights of labor to a day of rest, the Roman Catholic Church as distinct from Protestantism is not much interested in Sunday laws. The Catholic theory is that as long as a member of the Church attends mass, he may spend the rest of the day in any way he likes that is not evil or offensive to the public. Professional baseball games, parties, the theater, are for him all perfectly legitimate. The Catholic therefore does not join the Protestant in appearing before legislatures in opposition to Sunday commercial sports as long as these do not interfere with the regular Sunday morning church hours. The continental view has been growing considerably of late on the fringes of Protestantism, especially in urban centers.

* * *

"There is frequently conflict between Church and State over laws regarding Sunday amusements. In general these are being relaxed wherever cosmopolitan urban populations so demand, but local Protestant Church federations generally oppose such relaxations, especially when they involve commercialized sports or theatrical performances. Indeed, the organized Protestant forces of an American community are generally dominated by Presbyterian, Baptist, and Methodist

groups which are ardent supporters of stricter Sunday laws.

"But there are exceptions. Episcopalians are apt to be more liberal, though they do not go as far as their Roman Catholic brethren in this direction. Here and there, and especially in the large cities, an outstanding Protestant minister is found who does not believe in strict Sunday laws. A striking example of this attitude was provided by Alexander Campbell (1788-1866), co-founder with his father of the Disciples of Christ. He took the ground that Sunday laws were unscriptural and unchristian; that there was not a precept in the New Testament to compel any man by civil law to regard the day; and that to try to command those who did not believe in the Christian religion to observe it, is 'anti-evangelical or contrary to the gospel'. This is substantially the view of the Jews—who would, of course, substitute the teaching of the Old Testament for that of the New—and of the Seventh Day Adventists. The latter are continually carrying on from their national center in Takoma Park, Maryland, a vigorous but dignified campaign in opposition to all restrictive Sunday legislation.

"A Lutheran pastor opposing the Sunday laws of Pennsylvania in 1933 and advocating their repeal, explained his position by saying:

> '. . . My appearance was meant solely to point out the dangers of religious legislation, which is class legislation, and to make clear the position of our church, which has its convictions, but has never tried to force anyone into believing as we do. It is in my humble estimation, a deplorable situation when the churches of Christ who feel that they ought to keep Sunday, try to force everyone else to do the same thing, regardless of their conviction. It is thoroughly un-American. . . .'

'My plea is this: Let us respect each other's convictions. If you are so inclined, try to make your convictions my convictions by persuasion, but let us desist from forcing, coercing, legislating people into our position, if we feel that the gentle art of persuasion yields no results. As for me, I still want to be able to sing "Sweet Land of Liberty", liberty for myself, and even for those who do not happen to agree with me. When the church has to hide behind the skirts of officialdom, it is a sign that the youngster is weak and sick.'

"These views may be taken as representative of a considerable and increasing minority opinion in organized Protestantism."

The following is from EGGLESTON, THE TRANSIT OF CIVILIZATION, FROM ENGLAND TO AMERICA IN THE SEVENTEENTH CENTURY (Beacon Ed., 1959), pp. 160-164:

". . . Ecclesiastical and governmental interference helped to make a painfully rigorous repose on Sunday a distinctive badge of Puritanism. The Sabbath in the superlative degree crossed the high seas with the Puritan migration. In New England it was argued that, as the Sabbath was the principal outward means of honoring God, it stood for the whole duty of man toward God. And a right divine reverence was paid to it. Contrary to English custom, the greatest Puritan divines, Cotton and Hooker, maintained with consistent literalness that the consecrated time began at sunset on Saturday evening, because the Jewish Sabbath began on Friday, and the evening and the morning made a day in the first chapter of Genesis. Judaism sat hard on the Puritan conscience in many ways; even the Jewish preparation for the Sabbath was imposed on the people in the first years of New England. 'All that

inhabit the Plantation' were ordered, in 1629, 'to 'surcease their labors every Saturday throughout the year at three o'clock.' The rest of the day was given to catechising and other painful preparations of the soul for the irksome austerities of the Sabbath. . . . In solemn awe of the Sabbath the innocent gambols of the children were repressed as something particularly heinous. 'We should rest from labor, much more from play', says Cotton in a catechism ludicrously entitled Milk for Babes. The aged Increase Mather, as late as 1712, urged that children must not be suffered to play on the Lord's Day. Of rest the Puritan mind had no conception; it was a technical term that included the attending to public prayers, stretching sometimes to a full hour in length, and to sermons of yet greater prolixity, interspersed with home exercises to fill up the time and banish repose. The leaders were generally sincere enthusiasts bent on pleasing God and not even comprehending what a huge burden of unbearable Pharisaism they were binding on the backs of men. Probably nothing else in Puritanism, not even its hatred of heretics and its horror of witches, caused so much human unhappiness in the aggregate as did its effort to transform the Christian Sunday into a punctilious Hebrew Sabbath. For the attainment of this end almost every sort of outrage on personal liberty was perpetrated by the magistrates and by domestic authority. Even foreigners presumably ignorant of the law were liable to arrest and other indignities, if caught strolling in the streets of Boston on Saturday evening after sunset. Ambassadors from a French Catholic colony were shut into Winthrop's house the entire Sunday for fear of collision with public opinion and the constables. This polite incarceration was mitigated by 'the liberty of a private walk in the garden'. . . .

"The yoke of bondage enforced by law galled the necks of those who were less religious who held to the easier habits of the Church of England. . . . Later in the century there was a party that denied the right of the colonial government to enforce the Sabbath and prescribe modes of worship. An election sermon was leveled at this uprising, and the Synod of 1679 even shakes at it the old superstition used by Dr. Bownd in 1595, and later in the Practice of Piety, that conflagrations are intimately connected with lax Sabbath observance. And indeed the New England Sabbath, though almost too much for flesh and blood, had by this time become a fixed tradition, good for yet more than a hundred years of survival before it should begin to show signs of decline. In 1740 we find it still the custom to shut the gates of the Boston peninsula and to put a guard at the ferry, that no one might go forth on Sunday. And the traveler who gives us this account of the stage of siege in which Boston put itself once a week adds that if 'they could escape out of the town, it wouldn't answer their end; for the same care is taken, all the country over, to prevent travelling on Sundays . . . They will not suffer any one to walk down to the water side, though some of the houses are adjoining to the several wharfs, nor even in the hottest days of summer will they admit any one to take the air on the Common. . . . The justices, attended with a posse of constables, go about every week to compel obedience to this law.' Even a group of two or three might not talk together in the street on Sunday. . . ."

APPENDIX C.

Injustices Committed Against Seventh-Day Adventists by the Sunday Blue Law of Pennsylvania.

1. *Seventh-day Adventists regard the Pennsylvania Sunday blue law as unjust.* Many thousands of devout members of the Seventh-day Adventist Church, the Seventh Day Baptist Church, and other Christian groups,—as well as the pious members of different Jewish congregations—rest and worship God on the seventh day of the week in accordance with the divine law as they understand it.

The Sunday law requires these people to refrain from engaging in decent and honorable labor in the pursuit of their livelihood on Sunday even after they have scrupulously rested on the preceding day for valid religious reasons. Compliance with the demands of the blue law thus causes them to forfeit and lose one-sixth—or nearly 17% of their weekly income. Failure to comply with the law by resting also on Sunday subjects them to penalties of fines, imprisonment, or both. Therefore, they are penalized if they *do* and penalized if they *do not* obey the Sunday law.

2. *The Pennsylvania Sunday blue law is illogical and absurd.* It makes acts that are not criminal or evil in themselves a crime. If common labor that is decent and honorable in itself is to be regarded as lawful on six days of the week, there is no reason why it is to be regarded as unlawful on the first day of the week, except it be a religious reason. Acts that are *per se*, immoral or criminal in nature ought to be prohibited every day of the week, and not made lawful six times as often as they are made unlawful.

3. *The Pennsylvania Sunday blue law is definitely discriminatory in the matter of religion.* It imposes no such unjust conditions upon the religious people of the state who

keep the first day of the week as their day of rest and worship, but is designed to permit them to engage in decent and honorable labor in the pursuit of their livelihood six days a week, including the seventh-day Sabbath. Would they not vigorously protest if they were denied the right to work on Saturday and thus forced to lose one-sixth—or nearly 17% of their weekly income even though they observe Sunday for rest and religious purposes? Is not the right of the Sabbatarian to work six days and earn six days' income as sacred as the right of the Sunday-observing Christian to do the same? Do not the families of the Sabbatarians need shelter, food, clothes, and the other necessities of life as much as do those of Sunday keepers? Why then should a law-abiding resident of this state be reduced by law to the status of a second class citizen simply because of his religious convictions?

4. *The Pennsylvania Sunday blue law would have individual conscience surrender to state control in religious matters, and sets a precedent for further religious legislation.* If the state has the right to meddle in religious matters, and to use the police power to favor and abet one religious segment of its population, by telling everyone upon what day of the week he must rest, and how he shall keep it, what will stop it from pursuing such a policy in regard to other religious matters? It could dictate which version of the Holy Scriptures should be used—whether the Roman Catholic text, which includes the Apocrypha; the Protestant text, which omits the Apocrypha; or the Jewish text, which omits both the Apocrypha and the New Testament. And it could likewise make no exceptions to the rule in these and other religious matters in so far as dissidents are concerned, just as it has made no exceptions in the Sunday blue law for those people who keep the seventh day as the Sabbath.

5. *The Pennsylvania Sunday blue law is dangerous because it places in the hands of religious zealots a weapon*

for their use against people who do not conform to their particular religious belief in regard to Sabbath observance. It affords opportunity for the Sunday-keeping religious zealot to spy on his fellow citizens who keep the seventh day of the week for religious purposes and rest, and to have them fined, imprisoned, or both if they catch them working on Sunday. Seventh-day Adventists know by experience what such persecution means. See AMERICAN STATE PAPERS, pages 457-506. (*American State Papers and Related Documents on Freedom in Religion*, Published in 1949 by the Review and Herald Publishing Assoc., Takoma Park, Maryland. Fourth Revised Edition.) (First edition compiled by William Addison Blakely of the Chicago Bar.)

6. *The Pennsylvania Sunday blue law is definitely un-Christian.* A fundamental principle of Christianity, as stated by its founder himself is this: "Thou shalt love thy neighbor as thyself." Matthew 22:39; Mark 12:31; Luke 10:27; Romans 12:9; Galatians 5:14; James 2:8. The Sunday-keeping proponents of the Pennsylvania Sunday blue law do not by this piece of religious legislation treat their neighbors who keep another day of the week than Sunday as the Sabbath as they do themselves. They reserve for themselves the right to work six days in the week and to rest on the particular day of their choice, while they refuse to allow their Christian and Jewish neighbors who observe another day of the week than Sunday to have the same religious freedom.

7. *The Pennsylvania Sunday blue law is un-American in its application to those citizens who observe another day of the week than Sunday.* When the American people rose up and broke the shackles that bound them under the colonial system, they vigorously declared to all the world: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, *liberty*, and the pursuit of happiness."—*The Declaration of Inde-*

pendence. Religious "liberty" is a precious freedom which the people of the United States have long enjoyed, while people in some other lands have been forced to live under systems of tyranny. Sunday legislation is a carry-over from the colonial period when religion was prominent in politics. It is un-American in that it assures to one segment of the religious population of the state the God-given right to work six days and rest on the day of their choice for religious reasons, while at the same time it denies this right to Seventh-day Adventists, Seventh Day Baptists, and Jews. The Pennsylvania law compels the latter to rest two days and work only five if they would worship God on the Sabbath day of their choice. That sort of legislation, we repeat, is un-American. By making no exemption for those who keep another day of the week than Sunday as the Sabbath day, the Pennsylvania Sunday blue law cannot rightly be called truly American legislation, because it guarantees to one segment of the state's religious population religious liberty that it denies to another.

8. *The Pennsylvania Sunday blue law manifests the spirit of the religious bully.* The Sunday-keeping proponents of this piece of religious legislation virtually say to their fellow citizens who observe the seventh day of the week as the Sabbath: "We are bigger than you are, for we outnumber you in this state. And inasmuch as we are more numerous and powerful than you, and can thus control the police power of the state, we are going to rest on Sunday and then work the remaining six days of the week as we please. But we are not going to let you Sabbath keepers enjoy similar rights so long as we can prevent it. We will forbid you to work on our day of religious rest, but we will labor on yours. You must work only five days in the week if you wish to keep your seventh-day Sabbath, for we are going to compel you to abstain from work on our religious rest-day, commonly called Sunday. If we catch you working on our day of rest and worship we will fine you, imprison you, or both."

9. *The Pennsylvania Sunday blue law is contrary to the pattern of a free society.* The American way of life gives primary value to the dignity and worth of the individual. In America we believe man is endowed by his Creator with inalienable rights of liberty of mind and soul. We believe in the freedom of a mature person to determine his own religious practices, and to assume his responsibilities as a free member of the American society. These values are on trial today. Totalitarian leaders of state and of church around the world have repudiated them. America must never abandon her precious boon of civil and religious liberty. If she does, she will cease to exist as a free nation. True progress can be achieved only on a basis of the recognition of human rights.

10. *The Pennsylvania Sunday blue law ignores the rights of religious minorities.* Governor George D. Clyde, of Utah, in his message to the Utah State Senate outlined his reasons for vetoing the state's controversial Sunday closing bill in February of 1959. He said: "The true democratic process rests as much on the principle of respect for the fundamental rights of minorities as on that of majority rule."

"So long as our constitution remains in force," declared former President Calvin Coolidge, "no majority, no matter how large, can deprive the individual of the right of life, liberty, or property, or prohibit the free exercise of religion or the freedom of speech or of the press." The fullest possible protection of the minority and the security of the majority from the domination of a powerful and entrenched minority are essential elements of American freedom. In matters of religion, neither the religious beliefs of the majority nor of the minority should become the law of the land.

11. *The Pennsylvania Sunday blue law adds confusion and conflict in a pluralistic culture.* In America's culture, varieties are legion. Interrelationships between the vari-

ous churches and religions, and between the religious and non-religious, require mutual recognition of the wide variations of viewpoints, and a charitable attitude toward those who differ. Harmonious adjustment cannot be maintained by legislating the sectional interests of certain segments of society regardless of their numerical strength, or their majority or minority status. Absolute freedom of conscience is essential to the spirit of brotherhood.

12. *The Pennsylvania Sunday blue law is religious legislation.* The observance of Sunday as a holiday is, both in its origin and its history, a religious institution. In the early centuries of the Christian era it was made an ecclesiastical festival commemorating the resurrection of Christ on the first day of the week. When Constantine the Great, emperor of the Roman Empire, professed conversion from paganism to Christianity in the early part of the fourth century, he launched a program for the uniting of church and state, and in doing so he issued the first civil Sunday blue laws—at least six of them—which became the precedent for all future Sunday legislation by civil governments.

In fact, the very custom of resting one day in seven is historically a religious practice. It is not the creation of any civil power. The practice originated when God—after creating the world in six days, as described in Genesis 1,—rested on the seventh day, blessed it, and sanctified it (set it apart for holy use). Genesis 2:2,3; Exodus 20:11; 31:17; Hebrews 4:4.

Controversy has raged for centuries in the ranks of Christendom in regard to which day of the week should be kept for religious purposes and rest. A large segment of the Christian population today alleges that Sunday should be kept as a sacred day because Christ rose from the grave on the first day of the week. Mark 16:9. But other Christians conscientiously believe that Christ was the Creator of the world (John 1:1-3, 10, 14; Ephesians 3:9; Colossians 1:13-17; Hebrews 1:1, 2), and was therefore the Divine One

who rested on the seventh day, and blessed and sanctified it. Hence He had valid reason for declaring: "The Son of Man is Lord also of the Sabbath day." Matthew 12:8; Mark 2:28; Luke 6:5. The seventh-day Sabbath is the only day of which He declared Himself to be the Lord. It is the true Lord's day, for "the seventh day is the Sabbath of the Lord thy God." Exodus 20:10.

Christ Himself was a Sabbathkeeper (Luke 4:16), and His disciples observed it with Him (Mark 1:19-20). There was never any disagreement between Him and His Jewish opponents in regard to which day of the week should be kept as the Sabbath. They both kept the same seventh day of the week as sacred, but they differed greatly as to the manner in which it should be kept.

Christ declared that He did not come to do away with the divine law, but insisted that it was as enduring as the ground beneath our feet and the sky above our head. Matthew 5:17-19; Luke 16:17. Hence He commanded His followers to make the Sabbath a matter of prayer during those trying times that would lay ahead when Jerusalem would be destroyed, that they might not have to flee on the Sabbath. Matthew 24:20. When their Saviour died on that memorable Friday of long ago, it was referred to by His followers as "the preparation, that is, the day before the Sabbath." Mark 15:42. "That day was the preparation, and the Sabbath drew on." Luke 23:54. And when they had given His body burial, "they returned, and prepared spices and ointments; and *rested the Sabbath day, according to the commandment.*" Luke 23:56. "And *when the Sabbath was past*, Mary Magdalene, and Mary the mother of James and Salome, had bought sweet spices, that they might come and anoint Him. And very early in the morning, the first day of the week, they came to the sepulcher at the rising of the sun." Mark 16:1,2. "And they entered in, and found not the body of the Lord Jesus." Luke 24:3. The reason for this is that "Jesus was risen early the first day of the week." Mark 16:9. Thus the Sabbath, accord-

ing to the Scriptures is the day before the first day of the week.

However, neither Christ nor His apostles ever declared in the Scriptures that the first day of the week is holy, is a day of rest, is blessed, is the Sabbath, or is the Lord's day. Not even once do they declare it to be a sin to work on the first day of the week, or that the Sabbath has been transferred from the seventh to the first day of the week, or that the first day of the week should be observed by Christians in commemoration of the Lord's resurrection from the dead. No commandment is given by them to observe Sunday as a weekly holy day in any manner.

No other valid reason can be given in Sunday legislation for decreeing that Sunday should be kept as a day of rest except the fact that a large segment of the religious poulation regards it as a holy day. Sunday blue law legislation is, therefore, meddling on the part of the state in a religious controversy in favor of Sunday-keeping Christians and by discriminating against Sabbath-keeping Christians and Jews.

Christ declared when He was interviewed concerning the Christian's duty to the state: "Render therefore to Caesar the things that are Caesar's and to God the things that are God's." Matthew 22:21. Caesar has no claim upon God's rest day for man for "the seventh day is the Sabbath *of the Lord thy God*"—*not of the state*. Exodus 20:10. He calls it "My holy day." Isaiah 58:13. Christ said of Himself: "The Son of Man is Lord even of the Sabbath." Matthew 12:8; Mark 2:28; Luke 6:5. The state (Caesar) has no just jurisdiction over God's holy day, the day that He has appointed for religious rest, for He has declared that it belongs to Him. Therefore, the observance of the day of religious rest in *an obligation* that the *citizen owes solely to God*, and the state should not attempt to dictate to him what particular day of the week that should be or how he should observe it.

The state has not been appointed by God to decide by law what day of the week men should keep, or how they should keep it. Benjamin Franklin, one of the fathers of our country and one of the greatest citizens that the United States and Pennsylvania ever had, has well stated the case in these words:

> "When a religion is good, I conceive that it will support itself, and, when it cannot support itself, and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, it is a sign, I apprehend, of its being a bad one."—Letter to Dr. Price, October 9, 1780, in the *Writings of Benjamin Franklin*, edited by Albert Henry Smith, Vol. 8, p. 154.

Seventh-day Adventists ask no special favors for themselves in this controversy over the Sabbath question, for they believe and know that religious truth can defend itself in an open and fair contest. All that they ask in this matter is to be treated with equity and justice, and that the state give freedom for all and special favor and protection for none. Since the observance of one day in seven for sacred purposes and rest involves a religious duty that the citizen owes solely to God, and not the state, they believe that every man should be left free to decide for himself which day he shall rest upon as holy to God, and how he shall keep it unto Him. They believe that since the observance of a weekly day of rest is a matter conscience and religious conviction, it should be left to each of the various religious groups to settle the question for itself. Despite the fact that the world at large spends the seventh day of the week in the hustle and bustle of commerce and industry, Seventh-day Adventists have been able to worship quietly in their churches and to carry on their work successfully and to increase in numbers, by resorting only to the teachings of God's Holy Book and persuasive power of the love of the gospel of Christ in promoting their beliefs. They have not

asked that the police power of the state be used to force men to rest on the seventh-day Sabbath, and would recommend this eloquent silence to other religious people whose home is America. Certainly if this small denomination can do that, there is no reason why the larger ones that rest on Sunday should resort to the police power of the state in order to meet the competition that they face on Sunday in a free country where every man is protected in his right to determine for himself what day of the week God would have him observe as the day of rest. But as long as the Pennsylvania Sunday blue law provides no exception for the people who rest on another day of the week than Sunday as the Sabbath day, it cannot be said that all the citizens of this great state equally enjoy the boon of religious liberty.

All that Seventh-day Adventists ask is the privilege of enjoying their American citizenship without economic discrimination, nor a second-class status being forced upon them because they observe another day of the week than Sunday as their day of rest.

MELVIN W. ADAMS,
Associate Secretary
Department of Public Affairs,
General Conference of Seventh-day Adventists.

(See, for an excellent collection of papers on this subject, the Seventh-day Adventist volume, AMERICAN STATE PAPERS ON FREEDOM IN RELIGION (3rd Ed., 1943)).

APPENDIX D.

IN THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY, PENNSYLVANIA

No.

TERM, 1960

COMMONWEALTH OF PENNSYLVANIA

v.

ANNE CAVALERRO, 1726 SOUTH 11TH STREET, PHILADELPHIA, PENNSYLVANIA

Miscellaneous Division

No.

TERM, 1960

COMMONWEALTH OF PENNSYLVANIA

v.

MORRIS LEVENSTON, 908 SOUTH 58TH STREET, PHILADELPHIA, PENNSYLVANIA.

OPINION AND JUDGMENT.

April 20, 1960. ALEXANDER, *J.*

I.

Petitioner Anne Cavalerro seeks the allowance of an appeal from her conviction before a Magistrate for selling a lady's slip on Sunday, allegedly in violation of the Act of

August 10, 1959, P. L. 212, 18 Purd. Stat. § 4699.10.[1] Morris Levenston appeals from a similar conviction for selling on Sunday, although he actually was not selling, but was merely the manager of the store. Both were employed at Bargain City stores located in Philadelphia. The fines assessed are small, but the issues posed by the petitions are large, and deserve full and thorough consideration.[2]

For three and a half centuries, the people of America have expressed, at first in their colonial Charters and Compacts, and for the last 200 years in our Constitutions, their finest ideals of political life, ideals which I believe will represent to future civilizations the unique contribution of America to mankind, a contribution beside which our technical advancement may be lost in the sands of time.

No principle of government is more inextricably woven into our Constitutional fabric than these: that the law shall not discriminate between man and man, and that Caesar shall not meddle with that which is God's.

We here in Pennsylvania have sought to assure unto ourselves these great rights by Article 3, Section 7 of the

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1. Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof. "Each separate sale or offer to sell shall constitute a separate offense . . ." (P. L. No. 212, 18 Purd. Stat. § 4699.10)

2. Cf. *Thompson v. Louisville*, (the so-called "shuffling case") Oct. Term, 1959, No. 59, where the Supreme Court of the United States on March 21, 1960, in a unanimous opinion, reversed convictions for disorderly conduct on which the defendant had been fined $20.00. 28 U. S. Law Week 4193, 5.

Constitution of 1874 reading, to the extent pertinent herein that:

> "The General Assembly shall not pass any local or special law: . . . Regulating labor, trade, mining or manufacturing . . .,"

and by Article 1, Section 3 of the present Constitution, identical with the Constitutions of 1790 and 1838:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and *no preference shall ever be given by law to any religious establishments or modes of worship.*"

But, being human, we err. The temptations of the day, like Circe, understandably lure our lawmakers. And, as in the Odyssey of Homer, Penelope seemed far away from her lord, Odysseus, yet there he was standing before her. The Constitution seems far away. Yet, to the judge, like a pricking conscience, falls the task of leading us back into the path of constitutionality, to maintain like the watchmen in the night, the eternal vigilance which is liberty's price.

Petitioners contend that the Sunday law contravenes both constitutional provisions set out above and also their counterparts in the Federal Constitution, the Fourteenth Amendment, into which now has been incorporated the religious guarantees of the First Amendment.[3]

The Commonwealth argues that here, as is the case generally in issues of constitutionality, the law is presumed to be valid and the burden of persuasion is upon the party attacking it. Petitioners cite respectable authority for the

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3. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943), reversing 149 Pa. Super. 175.

view that the burden, in the areas of personal liberty including religion and free speech, is upon the Commonwealth to persuade us that the interference is reasonable and free of constitutional infirmity.[4] With this view we agree although we do not deem it necessary to decide this issue because it is our opinion that the Sunday law is unconstitutional, regardless of which party has the burden of persuasion.

II.

Let it be assumed first that the Law is, as the Commonwealth urges, civil or economic, and not relgious, legislation.

Chief Justice Horace Stern a few years ago, writing for a unanimous Supreme Court, stated:

> ". . . By a host of authorities, Federal and State alike, it has been held that a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and *the means which it employs must have a real and substantial relation to the objects sought to be attained.* Under the guise of protecting the public interests *the legislature may not arbitrarily interfere with private business* or impose unusual and unnecessary restrictions upon lawful occupations. . . ."[5]

And, as the Court said in *Kurtz v. Pittsburgh*, 346 Pa. 362, 368 (1943):

> "The basis for classification must be reasonable and proper and founded upon a real, and not merely artificial, distinction between the members of the class and the general public, and based upon 'a necessity springing from manifest peculiarities, clearly distin-

4. *United States v. Carolene Products Co.*, 304 U. S. 144, 152 fn. 4 (1938); *Murdock v. Pennsylvania*, supra; *Thomas v. Collins*, 323 U. S. 516 (1945).

5. *Gambone v. Commonwealth*, 375 Pa. 547, 551 (1954).

guishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others.'"

See also *Læplacca v. Philadelphia Rapid Transit Company*, 265 Pa. 304, 308 (1919).

The Supreme Court of the United States has stated the rule as follows:

"'. . . . Classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike, but the object of the classification must be for the accomplishment of a purpose or the promotion of a policy which is within the permissible functions of the state, and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible.'' *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 406 (1928).

How does the Sunday law square with these requirements? I can discern no real or substantial relation between this legislation and any object constitutionally within the power of the Legislature to achieve in the realm of civic or economic legislation.

The law prohibits the sale on one day of the week of commodities in general use, the sale of which has never been generally prohibited and indeed could not be, because in most instances they are necessities of life, viz: clothing, furniture and the like. What conceivable purpose can such a law have? Nothing in the nature of the commodity itself requires that its sale be subjected to regulation. By way of illustration, it is not a narcotic, to be restricted to sale upon prescription. It is not alcohol, to be sold only to

adults. It is not milk, to be sold only upon compliance with sanitary requirements. In short, there is nothing intrinsic in the nature of the items covered by the Sunday law which affords any rational, non-religious reason for prohibiting their sale on Sunday, as against any other day.

What, then, is it about Sunday that can sustain the legislation? We pass for the moment the religious implication of the day, because if the law has a religious purpose, then, as pointed out below, it would be unconstitutional for that reason.

The Commonwealth contends that the Sunday law is appropriate in order to assure a day of rest, that at least one day's rest in seven is a proper health or welfare measure, and that Sunday may be selected as that day because of the difficulty of enforcing a rest law which does not designate a single day upon which all citizens must refrain from work and rest. We may assume all this to be valid, although I doubt that it is,[6] but it does not save this law because the instant classification is arbitrary. I do not

6. For several reasons: (a) Pennsylvania, like the Federal government and other states, has enacted a series of genuine labor laws covering comprehensively this subject. See, e.g., Act of July 25, 1913, P. L. 1024, § 3, as amended, 43 Purd. Stat. § 103(a) (Women cannot work more then six days in any one week); Act of May 13, 1915, P. L. 286, § 4, as amended, 43 Purd. Stat. § 46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, § 1, 43 Purd. Stat. § 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, § 1, 43 Purd. Stat. § 481 (employees of motion picture theatres must be given one day of rest per week). (b) Many states (Arizona, California, Oregon, Wisconsin and Wyoming) have one-day-in-seven rest laws (See Sunday Laws, 25 S. Calif. L. Rev. 131, 134) and I know of no problem in connection with their enforcement, or with the enforcement of the labor laws referred to in (a) above. Indeed, such laws generally are enforced, whereas the sporadic or discriminatory enforcement of the Sunday laws is common knowledge, and tends to bring law enforcement generally into disrepute. (c) Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used, and mere ease of enforcing a more restrictive alternative will not sustain it. See, e.g., *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949).

predicate this conclusion upon the exclusion from the law of persons making wholesale sales and indeed, persons engaged in all other industrial or commercial activities generally, although I can ascertain no reason why they are in less need of rest than retail sales people. However, such distinctions, whatever they may lack in common sense, at least have the imprimatur of tradition, albeit in other contexts.[7]

This law forbids a clerk to sell to my blind neighbor a Dylan Thomas *recording*, but does not prohibit the same clerk from selling me a *book* containing exactly the same poems from the next counter. Side by side in Bargain City and many other stores are *tricycles*, which cannot be sold to me for my two-year-old granddaughter because they are toys, and adult bicycles which I can buy for myself or for my daughter just out of her teens. A clerk may sell me seat covers for my automobile, but he cannot sell me slip covers for my sofa. If I have forgotten to shop for a birthday present for my wife during the week, the same store may sell me on Sunday without violating this law a camera, ice skates or a dozen roses, but not a watch or a suitcase or a tie pin for myself. It cannot sell me a *toy* rubber football for the four-year-old; but this law does not prohibit the sale of a football for the teenager, for one is a *toy* and the other is not, and *sporting goods* are not covered by this law.

These examples could be multiplied endlessly by anyone strolling through Bargin City, a department store or a drug store with a copy of the law in his hand and the law must be kept in hand or exacty memorized, because there is no intelligible logical principle by which one may determine what is excluded and what is included.

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7. It was argued by counsel for the petitioners and not denied that some of the corporate interests supporting the "rest" law now at issue at the same time were attempting to get the Pennsylvania Legislature to enact a law permitting bartenders to work in hotels on Sunday. It would seem to me that an overworked or tired bartender would do himself and his customers much more harm than a tired girl clerk selling slips as here complained of.

The 2-1 decision of the three-judge court in *Two Guys From Harrison, Inc. v. McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), now on appeal to the Supreme Court of the United States, Oct. Term, 1959, No. 699 does not require a different result, for many reasons. In the first place, that court did not inquire into the Pennsylvania Constitution, which we consider here. Second, I believe it is implicit in the *Two Guys* opinion that the Court there felt constrained to decide as it did, not because it was persuaded logically that the classification was reasonable (indeed the Court indicated that it was whimsical), but because it felt constrained so to do by *Friedman v. New York*, 341 U. S. 907 (1951), a decision which has no application to the Pennsylvania Constitution. Third, equally distinguished federal judges, former Chief Judge Magruder, my own former teacher, for whom I have the most profound regard, and Chief Judge Woodbury, by reasoning which I find more realistic, decided to the contrary. *Crown Kosher Super Market of Massachusetts v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), now on appeal to the Supreme Court of the United States, Oct. Term, 1959, No. 532. Both the *Two Guys* and the *Crown Kosher* cases now await the consideration of the Supreme Court of the United States. Finally, the Pennsylvania Supreme Court has also recently had occasion to indicate that the *Two Guys* decision, while entitled to great respect, does not foreclose a nisi prius court, which this is, from arriving at its own independent decision. *Rubin v. Bailey*, 398 Pa. 271 (1960).[8]

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8. The final decision of the Montgomery County Court in the *Rubin* case is, of course, not determinative here. That was an equity suit and the principal ground for decision was that the plaintiff did not come into court with clean hands. Such defense is not available to the Commonwealth in this criminal suit. With regard to the constitutionality of the Act, the Court's opinion disposes of the problem in one paragraph without discussion, simply citing the *Two Guys* case which has been discussed at length above.

The Court did not state that the Pennsylvania Act was not unconstitutional. It merely stated that in an equity proceeding where the plaintiff was seeking injunctive relief against the enforcement of a

I conceive it to be the duty of any judge, met with a constitutional issue in this sensitive area, to apply the law as he conscientiously sees it unless constrained otherwise by a binding precedent of a superior court. However pious the purpose of the law, it must still meet the test of reason, and a distinction which a judge would not tolerate as reasonable or rational on Monday does not become so on Sunday. Judge Voelker, whose literary skill exceeds mine, as 61 weeks on the best seller list attests,[9] has put it better than I can in *Peoples Appliance and Furniture, Inc. v. City of Flint, Michigan*, —, 99 N. W. 2d 522, 530 (1959):

> "... there exists a curious and rather widespread judicial reticence when our courts are dealing with so-called Sunday ordinances. The judicial approach then often seems to become gingerly to the point of timidity, as though the fact that, however invalid such ordinances may be when judged by ordinary standards, after all most Sunday ordinances are plainly on the side of morality and all right-thinking people and, if they should err, they do so on the side of the angels. If such a tendency exists (and we trust we are wrong), we can only observe that an unreasonably discriminatory or otherwise invalid ordinance is no less bad because it happens also to please the pious. It is bad enough that Sunday ordinances should ever unreasonably discriminate between our people; it is doubly bad should there ever be any hint of judicial discrimination in their interpretation as against the accepted rules of interpretation applying to ordinary ordinances. Yet this apparent double standard is particularly evident in Michigan, as I shall presently undertake to demon-

criminal statute that the plaintiff would prevail only if he could show that the statute was "so unconstitutional on its face as to bring the plaintiffs within the ruling of" *Duquesne Light v. St. Clair*, 377 Pa. 323 (1954). This, of course, is not the rule in a criminal suit as here.

9. Author of *Anatomy of a Murder*, under the nom de plume Robert Traver.

strate. One had not heretofore been sufficiently aware of the fact that in Michigan there are evidently Sunday standards for judging Sunday ordinances. I am now aware and I do not like what I see."

The decisions on this issue of classification in other states are divided, with the majority sustaining the classifications there involved. See the cases collected in 20 A. L. R. 1117, 98 A. L. R. 1093, 126 A. L. R. 743. However, I prefer the reasoning in such cases as *City of Mt. Vernon v. Julian*, 369 Ill. 447, 17 N. E. 2d 52 (1938); *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N. W. 2d 643 (1951); *Gronlund v. Salt Lake City*, 194 P. 2d 464 (Utah, 1948); *Allen v. Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1938); *Gaetano Bocci & Sons Co. v. Town of Lawndale*, 208 Calif. 720, 284 Pac. 654 (1930); *Deese v. City of Lodi*, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937); *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939 (1943); *Ex parte Hodges*, 65 Okla. Crim. 69, 83 P. 2d 201 (1938); *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952). It is more realistic, more candid, more logical. It certainly accords more with the spirit and rationale of the long line of Pennsylvania decisions which have considered the constitutionality of business legislation.[10]

The general application of the Act of 1794, 3 Sm. L. 177, 18 Purd. Stat. § 4699.4, does not save the 1959 Sunday Law. The penalty under the early law is radically different, a $4.00 fine for an entire Sunday's business as against $100.00 for the first sale or offer to sell and $200.00 for *each* subsequent sale or offer, plus much longer imprisonment in default of payment of the fine. It does not provide for equal treatment in fact or law as between the sales or offers to sell included in the 1959 Law and those excluded there-

10. See *Commonwealth ex rel. Woodside v. Sun Ray Drug Co.*, 383 Pa. 1 (1955); *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25 (1948); *Commonwealth v. Stone*, 191 Pa. Super. 117 (1959).

from.[11] Nor do the decisions under that law,[12] which is of relatively general application, apply here where the discrimination is so marked and so unjustifiable between one commodity and another of virtually the same properties sold under the same conditions.

Having reached the conclusion at this point that this particular Sunday law is unconstitutional because of its classifications and because it is without real or substantial relation to any object which the Legislature may constitutionally seek to attain, this opinion might properly conclude. However, it is not unlikely that appellate review may be sought of this decision because of the public importance of the issues at stake. Accordingly, I think it appropriate to discuss the other principal question before me, namely whether the law violates the constitutional prohibition against religious legislation.

The ground upon which the Pennsylvania Supreme Court for many years predicated its decisions that Sunday laws were constitutional, namely that "Christianity is part of the common law of Pennsylvania . . . Sunday is the holy day among Christians",[13] is the very reason why these laws would now have to be held unconstitutional. Neither Christianity nor any other religion is part, nor can constitutionally be part, of the law of this Commonwealth. Neither Sunday nor Saturday nor Friday nor any other day, however holy it may be among the adherents of one religion or other, is a holy day or can constitutionally be a holy day within the eyes of the law. The Pennsylvania

11. The subsequent exemptions from the Act of 1794 (e.g., Act of July 2, 1935, P. L. 599, 4 Purd. Stat. §§ 59-65; Act of April 25, 1933, P. L. 74, 4 Purd. Stat. §§ 81-87), to the extent they have any application here, would only accentuate the unequal legislative restraint upon the present petitioners.

12. E.g. *Commonwealth v. Baader*, 188 Pa. Super. 424 (1958), allocatur refused, 188 Pa. Super. xxviii (1959).

13. *Commonwealth v. American Baseball Club of Phila.*, 290 Pa. 136, 143 (1927); *Commonwealth v. Hoover*, 25 Pa. Super. 133, 139 (1904); *Sparhawk v. Union Passenger Railway Co.*, 54 Pa. 401, 408-409 (1867).

Legislature cannot sanctify or honor or compel observance or respect for any such day, or the religious tenets it commemorates.

There is in the record of this case, for the first time in any case I have found, explicit and uncontradicted testimony by expert witnesses [14] that Sunday is the Lord's Day among Christians, that it commemorates the Resurrection of Jesus just as does Easter, that to accept Sunday as a holy day is to accept the Divinity of Jesus, that to be *compelled* by law to refrain from work on Sunday is to be *compelled* by law to show respect for and to honor the Resurrection and the doctrine of the Divinity of Jesus.[15]

(The writer might say parenthetically, that having written this opinion during most of the Holy Week and concluding it today, Saturday before Easter (with time out for religious observance), never have I been more impressed with the sentiments expressed by the Supreme Court of Ohio, in refuting the contention that "Christianity is a part of the common law of this country" in its reply ". . . True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness. . . . A form of religion that cannot live under equal and impartial laws ought to die, and sooner or later must die." (*Minor v. Board of Education of Cincinnati*, infra, N. 17.))

Refraining from work, under compulsion of law, is a compulsory form or symbol of respect, like kneeling or

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14. This testimony was given by Dr. Sidney B. Hoenig, an ordained Rabbi and Professor of History at Yeshiva University, and Elder Robert L. Odom, an editor and historian of the Seventh Day Adventist Church.

15. See Statement of William Lloyd Garrison in *Stokes, Church and State in the United States*, Vol. III, pp. 154-169; *Mark, The Faith of our Fathers*, p. 286; *Fisher, History of the Institution of the Sabbath Day*, pp. 63-66.

standing or covering or uncovering the head.[16] This is offensive, according to the expert witnesses, to Seventh Day Christian Sabbatarians and to Jews, and I believe to persons of religious faiths other than the Christian, to atheists, agnostics and even to those devout Christians who feel that religion is a matter for one's own conscience, uncoerced by any secular authority.[17]

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16. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), at pp. 632-633, 642, the Court said:

"There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, functions, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

* * *

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

17. See *Minor v. Board of Education of Cincinnati*, 23 Ohio St. Rep. 245-247:

"'We are told that this word 'religion' must mean 'Christian religion', because 'Christianity is a part of the common law of this country', lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a law of the state,

There has been no opinion of the United States Supreme Court on this issue since *Hennington v. Georgia*, 163 U. S. 299 (which incidentally was decided under the Commerce Clause), in 1896, the same year that the Supreme Court decided that stain on our constitutional history, *Plessey v. Ferguson*, 163 U. S. 537, so dramatically reversed in 1954 by *Brown v. Topeka*, 347 U. S. 483, where for the first time evidence was introduced showing that *Plessey* was based upon a wrong premise in fact. I believe the evidence introduced in this case and referred to above shows that *Hennington v. Georgia* likewise is grounded on an erroneous view of the facts. It is time, in view of the present complete

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like every other law, it must have a sanction. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. 'No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people. And is not the very fact that those laws do not attempt to enforce Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they are the laws of a Christian people, and that their religion is the best and purest of religions? It is strong evidence that their religion is indeed a religion 'without partiality', and therefore a religion 'without hypocrisy'. True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. Armed with these, and these alone, it is not afraid nor 'ashamed' to be compared with other religions, and to withstand them single-handed. And the very reason why it is not so afraid or 'ashamed' is, that it is not the 'power of man', but 'the power of God', on which it depends. True Christianity never shields itself behind majorities. Nero, and the other persecuting Roman emperors, were amply supported by majorities; and yet the pure and peaceable religion of Christ in the end triumphed over them all; and it was only when it attempted itself to enforce religion by the arm of authority, that it began to wane. A form of religion that can not live under equal and impartial laws ought to die, and sooner or later must die."

record in this case that this issue should be determined. A delay should not be experienced as was the case of correcting the evil effects resulting from the *Plessey v. Ferguson* decision (supra). Legal writers have, since the *Brown v. Topeka* decision (supra) of May 17, 1954, frequently written of the great delay in the progress of the Negro in his educational, political and cultural advance in America because of the erroneous interpretation of the facts which resulted in the 1896 decision in the *Plessey v. Ferguson* case (supra). A discussion of this subject appears in an article by this writer entitled "The Upgrading of the Negro's Status by Supreme Court Decisions", The Journal of Negro History, Vol. XXX, No. 2, April, 1945.

Similarly, in our own state we find no recent opinion of the Pennsylvania Supreme Court, and none since *Murdock v. Pennsylvania*, 319 U. S. 105 (1943), which reversed the Superior Court of Pennsylvania and decided that the religious clause of the First Amendment to the United States Constitution was applicable to the states through the Fourteenth Amendment.

It is true that a divided Superior Court a few years ago sustained the validity of another Sunday law and that allocatur was refused by the Pennsylvania Supreme Court.[18] However, there was absent from that case the expert testimony to which I have just alluded.

Here, again, as on the classification issue, *Two Guys* is not binding. Viewed afresh, the reasoning of *Crown Kosher* is more compelling. The *Two Guys* opinion proceeds upon the assumption that the Court is foreclosed from recourse to logic and independent judgment by *Friedman v. New York*, supra, even though the Two Guys court found as a *fact* that the law was religious in purpose and effect,[19] a fact not

18. *Commonwealth v. Bauder*, 188 Pa. Super. 424 (1958).

19. The Court in *Two Guys from Harrison v. McGinley* found that there were many persons in Pennsylvania who were offended in their religious beliefs by the required cessation of business on Sunday since it is "an enforced expression of respect for and acknowledgment

present in *Friedman*. There also is authority for the view that affirmance for want of a substantial question, as in *Friedman*, is not a decision on the merits, but is akin more to the refusal of certiorari.[20]

I am convinced that the Sunday law is religious in origin, that its present purpose is basically religious,[21] and that it is religious in effect. It represents the preferment by the Commonwealth of Pennsylvania of the conventional

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of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the Resurrection of Christ." 179 F. Supp. at p. 948. The court there also made the following additonal findings of fact:

"1. Sunday is a day designated for religious services and observances of Christians, with the exception of certain Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter.

"2. Sunday work at plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does work on any other day."

20. See Frank, United States Supreme Court: 1950-1951, 19 U. of Chi. L. Rev. 165 (1952) at p. 231:

"A word as to the appeals dismissed. Certiorari is a matter of the Supreme Court's discretion, while appeal is a matter of right to the party insofar as it is specifically authorized by Congress; cf. 62 Stat. 928 (1948), 28 U. S. C. A. § 1257 (1949). True, the Supreme Court may dismiss an appeal if it is 'insubstantial,' Zuch v. King, 260 U. S. 174 (1922), and the test of insubstantiality is extremely subjective. If the Court treats truly arguable questions as 'insubstantial,' or if it summarily affirms appeals, it has for all practical purposes obliterated the very difference between certioraris and appeals which Congress meant to preserve. The Court has for some years been in the process of interpreting away the difference between appeals and certioraris, reducing the appeals also to a matter of its own discretion; and it seems probable that within a few years there will be little practical difference between the two methods of review."

See also the Opinion of Justices Black and Douglas in *Linehan v. Waterfront Commission*, 347 U. S. 439 (1954).

21. The manipulation of this religious sentiment by certain commercial groups, whose economic interests happen to coincide therewith, does not destroy the religious nature of the law.

Christian religion and its basic tenets, the Resurrection and Divinity of Jesus, above all others. Petitioners and all persons who want to sell on Sunday cannot constitutionally be prohibited from doing so, under penalty of fine or imprisonment, by a religious law like this.

The Commonwealth cites cases in which it has been held that religious sensibilities must give way to civil legislation under the police power, as in compulsory vaccination and the prohibition of polygamy.[22] However, they do not apply here. Those laws were genuine, bona fide civil laws, motivated entirely by an intent to promote, in this world, the health and welfare of the populace. Religious views at variance therewith may, on occasion, not receive exception from such general laws. This law is not that kind. It is not secular or civil, but religious, just as would be a law prohibiting all persons from eating meat on Friday, or eating pork products (absent contamination), or requiring them to refrain from work on Christmas or Yom Kippur, or to doff their hats when passing a church, or to wear their hats when passing a synagogue, or to listen to Bible reading in the public schools.[23] It is not a civil law, within the power of the Legislature to enact, which happens to call for conduct conflicting with some religious belief, but rather a religious mandate, beyond the power of the Legislature ab initio, whether or not it conflicts with anyone's religious views.

And even in the case of genuine civil legislation, those whose religious views do not permit their compliance may be excused from its scope when a balancing of interests indicates that the public good will not be irreparably injured if the exception is permitted.[24]

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22. *Reynolds v. United States*, 98 U. S. 145 (1878); *United States v. Cleveland*, 329 U. S. 14 (1946).

23. *Schempp v. School District of Abington Township*, 177 F. Supp. 398 (E. D. Pa. 1959).

24. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943).

It is; therefore, my opinion that the Sunday law is void under both the Federal and Pennsylvania Constitutions, because it prefers certain Christian religions over all others and contributes to their establishment.

III.

For the reasons set forth in the foregoing opinion, it is

ORDERED:

That the petitions of Anne Cavalerro and Morris Levenston for allowance of appeal be and they hereby are granted, the convictions are reversed, and judgments of acquittal be and they hereby are entered as to each of said petitioner-defendants.

RAYMOND PACE ALEXANDER, *J.*

APPENDIX E.

IN THE COURT OF COMMON PLEAS NO. 2 OF PHILADELPHIA COUNTY

DECEMBER TERM, 1959

No. 1411

In Equity

BARGAIN CITY U. S. A., INC.,

Plaintiff,

v.

RICHARDSON DILWORTH, MAYOR OF THE CITY OF PHILADELPHIA; DONALD WAGNER, MANAGING DIRECTOR OF THE CITY OF PHILADELPHIA; VICTOR BLANC, DISTRICT ATTORNEY OF THE CITY OF PHILADELPHIA; AND THOMAS GIBBONS, POLICE COMMISSIONER OF THE CITY OF PHILADELPHIA,

Defendants.

ADJUDICATION.

DOTY, *J.* June 10, 1960

Plaintiff's complaint in equity avers that plaintiff operates a store at Twenty-third Street and Passyunk Avenue, Philadelphia, Pennsylvania, in which it leases space to concessionaires for the sale of merchandise and that, pursuant to the Act of August 10, 1959 (which is an Act prohibiting

the retail sale of certain merchandise on Sunday, popularly known as the New Sunday Blue Law), defendants have caused certain warrants of arrest to be issued against employees of plaintiff and its concessionaires. The complaint also alleges that one of plaintiff's employees has been subjected to the imposition of a fine and costs at a hearing held before a Magistrate in the City of Philadelphia and that defendants have threatened to continue to enforce the Act against plaintiff's store, but have refused to enforce the Act against other persons engaged in business who are in violation of said Act. Plaintiff avers that a substantial portion of its business is derived from its operations on Sundays and that it will suffer substantial and irreparable injury if it is prevented from continuing its Sunday operations.

The complaint further avers that the Act of August 10, 1959, is unconstitutional because it violates various sections of the Constitutions of the United States and of the Commonwealth of Pennsylvania. Plaintiff seeks an injunction against defendants restraining them from arresting or threatening to arrest plaintiff's employees or those of its concessionaires and further prays that this Court declare the Act unconstitutional.

On January 15, 1960, we granted a temporary restraining order which was vacated on January 22, 1960. The matter is now before us for a final disposition after a hearing and the taking of testimony in open court.

The basic facts are not in dispute, and after careful consideration of the pleadings, the testimony and the law in this case, we have come to the conclusion that the plaintiff is entitled to relief, that a permanent injunction shall issue, and we, therefore, make the following:

Findings of Fact.

1. Plaintiff operates a store at Twenty-third Street and Passyunk Avenue, Philadelphia, Pennsylvania, where various items of merchandise are sold at retail.

2. Defendants are the Mayor, Managing Director, District Attorney and Police Commissioner of the City of Philadelphia.

3. Plaintiff's store has been opened and operating for some time prior to the passage of the Act of August 10, 1959, P. L. 212, 18 P. S. 4699.10.

4. The Act of August 10, 1959, provides that it shall be unlawful to sell or offer to sell at retail on Sunday clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments, and recordings . . . .".

5. Plaintiff operates its store through concessionaires to whom it leases space within the store.

6. Both before and after passage of the Act of August 10, 1959, plaintiff's store has always remained open for retail business seven days a week including Sundays.

7. Enforcement of the Act of August 10, 1959, would compel plaintiff to close its store on Sunday since a large volume of retail business at its store consists of the sale of items forbidden by the Act to be sold at retail on Sunday.

8. The closing of the plaintiff's store on Sunday would result in a loss to plaintiff of approximately $40,000. per year and, as a result thereof, it would be necessary for plaintiff to close the store entirely and discontinue its business at that location. Continued enforcement of the Act of August 10, 1959, will, therefore, result in irreparable damage and injury to the plaintiff.

9. Sunday work at the plaintiff's store has no different effect upon the health or welfare of either the employees or customers of the store than does similar work on any other day of the week.

10. Various religious faiths observe Friday or Saturday as their Sabbath and believe that they are commanded by religious belief to abstain from secular activities on those days while Sunday is not such a day for observance by them. Generally, other members of the Christian faith observe Sunday as their Sabbath but do not consider Friday or Saturday as days for religious observance.

11. Because of the limitation on police personnel available, the Police Commissioner of Philadelphia has assigned a maximum of ten police officers per Sunday to enforce the Act of August 10, 1959, and this number of assigned police officers has not been sufficient to accomplish general enforcement of the law.

12. Because of the limited personnel available for enforcement of the Act, the Police Commissioner has adopted the policy of having the officers assigned to enforce the law make purchases on Sunday at certain large retail stores, one of which is the plaintiff's, and then instituting criminal prosecution against the sellers.

13. Several of the clerks at plaintiff's store have been arrested and fined for selling on Sunday items which the law prohibits being sold at retail on that day.

14. The established policy of the Police Commissioner is that the Act of August 10, 1959, is to be enforced in Philadelphia only against employees of certain large retail establishments.

15. Prior to the Act of August 10, 1959, the maximum penalty which could be imposed for commercial activity on Sunday in violation of the existing Act of June 24, 1939, P. L. 872, sec. 699.4, 18 P. S. 4699.4, was $4.00.

16. The $4.00 penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments.

DISCUSSION.

This case is but one of a number which have arisen in our state courts and federal courts sitting within this Commonwealth challenging the constitutionality of the Act of August 10, 1959, P. L. 212, 18 P. S. 4699.10.

Before considering the substantive questions involved, we are met at the outset by defendants' contention that this Court has no equitable jurisdiction in this proceeding. The defendants take the position that the plaintiff has not brought itself within the well recognized rule that equity will entertain jurisdiction to enjoin public officers from proceeding with the enforcement of a penal statute only where the validity of the statute is seriously and substantially challenged and, in addition, it is clearly apparent that irreparable damage and harm would result to the plaintiff if injunctive relief were denied. *Cooper v. McDermott*, 399 Pa. 160 (1960).

The *Cooper* case, *supra*, first decided by this Court and affirmed on appeal, is readily distinguishable from the one at bar. There the plaintiffs had a full, complete and adequate remedy at law in that they could challenge the constitutionality of the act in question by a motion to quash the indictment. Therefore, in that case, no irreparable injury resulted from the Court's refusal to entertain a prayer for equitable relief.[1]

However, it is unquestioned that equity has jurisdiction where there is no adequate remedy at law and that a court of equity can enjoin criminal prosecutions and threatened criminal prosecutions in certain instances. The instant case presents a situation very similar to that which existed in the case of *Kingsley International Pictures Corporation v. Blanc*, 396 Pa. 448 (1959), in which our Supreme Court reversed the lower court's dismissal of a complaint in equity. In that case the Court after setting forth the rule that equity

1. The companion taxpayer's suit was dismissed on other grounds.

ordinarily will not enjoin a criminal prosecution stated (page 455):

> "This rule has no application, however, where, as in the instant case, the equity proceeding is instituted by a person who is not a party to the criminal proceeding but who nevertheless has property rights which will be irreparably injured by the prosecuting activities of the District Attorney. In such a situation equity has jurisdiction because the plaintiff has no adequate and complete remedy at law. Indeed, he has no other remedy at all."

In the instant case, plaintiff is simply a landlord of the store at Twenty-third Street and Passyunk Avenue, Philadelphia, Pennsylvania. It does not engage in the selling of any merchandise at that location but merely leases space to concessionaires and it is these concessionaires who do the actual selling at retail for profit and, therefore, it is these concessionaires and not plaintiff who are subject to prosecution under the New Sunday Blue Law.

It is therefore clear that the case before us is governed by the decisions of the Supreme Court in the *Kingsley* case and the case of *Adams v. New Kensington*, 357 Pa. 557, 560-561, in which Mr. Justice (later Chief Justice) Stern, speaking for an unanimous Court stated:

> "But equity does have jurisdiction to enjoin such a prosecution where it is alleged not only that the statute or ordinance is unconstitutional and void but that its enforcement would cause the plaintiff irreparable loss to his property, either by effecting, if not a total suppression of his business, at least a grave interference therewith, or by subjecting him to the imposition of cumulative, exorbitant and oppressive penalties pending judicial determination of the validity of the legislation. In such cases, the ground of equitable jurisdiction is the protection of property rights, and the fact that a crim-

inal proceeding is involved is merely incidental." (Citations omitted.)

Plaintiff has alleged that a very significant percentage of the business done at its store is done on Sunday and there is no doubt that a substantial proportion of its total business involves the sale at retail of merchandise which the Act forbids to be sold on Sunday. The plaintiff has also alleged, and we find as a fact, that if the Act of 1959 is enforced at its store, it would be forced to close on Sunday and further, that a shut down on Sunday would force it to close the store completely and cease its operations, since its Sunday operations provide its margin of profit. Therefore, if this Act is enforced against the plaintiff an irreparable injury will result. Because of this and because we believe a serious challenge to the constitutionality of the New Sunday Blue Law has been presented, this Court of Equity has jurisdiction.

Nor do we think this case is governed by the recent decision of the Pennsylvania Supreme Court in the case of *Rubin v. Bailey*, 398 Pa. 271 (1960). In that case the only issue before the Court was whether or not the Chancellor had abused his discretion in dissolving a preliminary injunction. The Court did not have before it the question of whether the Chancellor could properly exercise the equitable jurisdiction of the Court nor did it decide that question. The Court merely held that the Chancellor did not abuse his discretion in dissolving the preliminary injunction which had previously been entered. In view of that narrow holding we are free to exercise our jurisdiction and decide the substantive issues raised in this matter.

We are not unmindful of the fact that Judge Raymond Pace Alexander has held the New Sunday Blue Law to be unconstitutional in the cases of *Commonwealth v. Cavalerro* and *Commonwealth v. Levenston*, Court of Quarter Sessions of Philadelphia County, Miscellaneous Division, filed April 20, 1960 (Reprinted in the Legal Intelligencer, April 22,

1960), which concerned the same Act here in question. However, we must point out that those were criminal cases in which the Court reversed summary convictions before a Magistrate and ordered that judgments of acquittal be entered. The Court in those cases did not have power to grant injunctive relief which the plaintiff here seeks, and the decisions of the Court do not prevent possible future arrests at plaintiff's store.

We are also aware that the United States Supreme Court has allowed appeals in several cases attacking the validity of Sunday Blue Laws of various states, including the New Sunday Blue Law Act of Pennsylvania, which is presently before us. However, a Court of Equity should not and must not deny a plaintiff the injunctive relief it seeks simply because another, albeit higher, Court has announced that it will hear and decide another case involving the constitutionality of the same law at some future time. Moreover, it is entirely conceivable that the opinion of the United States Supreme Court will not be dispositive of all of the issues raised herein since the present plaintiff has challenged the Act of August 10, 1959, as being violative not only of the United States Constitution but of the Pennsylvania Constitution as well.

Therefore, we will entertain jurisdiction in this matter and consider the substantive issues raised.

We must point out that the principle constitutional question before us is the challenge to the Act of 1959. This is so for two reasons. Although the plaintiff's complaint alludes to prior Sunday Blue Laws, it avers that the defendants have made arrests and are threatening to make further arrests by virtue of the Act of August 10, 1959. There is no complaint that defendants are enforcing or attempting to enforce any prior law prohibiting commercial activity on Sunday.

Moreover, equity should assume jurisdiction only in a situation where the plaintiff is threatened with irreparable

injury. There is testimony in the record of this case that the prior Act of 1939 was rarely, if ever, enforced in Philadelphia. Moreover, that Act differs from the one under consideration in that it provides for a fine of only four dollars, and it is well settled that no matter how many acts of worldly employment or business may be committed on the same day, they all constitute but a single offense for which but a single fine can be imposed. See *Friedeborn v. Commonwealth*, 113 Pa. 242. In addition, unless the violation of the 1939 Act amounts to a nuisance, it will not be enjoined. *Commonwealth v. Smith*, 266 Pa. 511. Therefore, the plaintiff can hardly complain that it would be irreparably injured if the defendants are not enjoined from enforcing the prior Act.

The defendants maintain that even if equity assumes jurisdiction in this matter, we are foreclosed from deciding that The New Sunday Blue Law is unconstitutional because of the Supreme Court's decision in the case of *Friedman v. New York*, 341 U. S. 907 (1951). In that case, involving an Act similar to the one here in question, the Court dismissed the appeal on the ground that the case did not raise "a substantial federal question." While it may be that such an action constitutes a vote on the merits of a case (see *Eaton v. Price*, 360 U. S. 246 (1959), the fact remains that the United States Supreme Court has now agreed to hear an appeal in the case of *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), which is a case involving an attack upon the constitutionality of the Act here in question.

Moreover, a sufficient answer to this contention is that Judge Magruder in the case of *Crown Kosher Super Market v. Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), held that the *Friedman* case was not controlling on issues similar to those now under consideration. In addition, of course, the *Friedman* case would in no way be controlling on the issue of whether the New Sunday Blue Law violates any provision of the Constitution of the Commonwealth of Pennsylvania.

Since as early as 1794 Sunday Blue Law statutes have been enforced in this Commonwealth. However, it is to be remembered that these laws were initially enacted in a setting far different from that which prevails today. The status of Pennsylvania at that time was primarily that of an agrarian society with little commercial and practically no industrial activity as we know these terms today. In addition, there was a general acquiescence in the observance of Sunday as a day of religious worship. The intervening years have brought about many changes and the Commonwealth of Pennsylvania is today a highly industrialized and commercial center of activity. Accordingly, the Legislature has taken cognizance of these changes on a number of occasions and has enacted various laws which create exceptions to the general prohibition of engaging in worldly activity on Sunday.[2]

The defendants contend that the New Sunday Blue Law is not religious in nature but rather is a "day of rest"

2. These statutes now make it lawful, despite the general prohibition, to operate a motion picture house after 2:00 p.m. on Sunday if the voters of the municipality so vote by referendum (Act of July 2, 1935, P. L. 599, 4 P. S. 59-65); to play professional baseball and football after 2:00 p.m. on Sunday, if the voters of the municipality so vote by referendum (Act of April 25, 1933, P. L. 74, 4 P. S. 81-87); to stage musical concerts after 12:00 noon on Sunday, when authorized to do so by Commonwealth's Department of Public Instruction, and to compensate musicians participating in such concerts (Act of June 2, 1933, P. L. 1423, No. 308, 4 P. S. 121-127); to play polo after 1:00 p.m. and before 7:00 p.m. on Sunday unless the voters of the municipality have voted to the contrary by referendum (Act of June 22, 1935, P. L. 446, 4 P. S. 151-157); to play tennis after 1:00 p.m. and before 7:00 p.m. on Sunday (Act of June 22, 1935, P. L. 449, 4 P. S. 181-185) provided that the conduct of other sports on Sunday afternoon has been approved by municipal referendum; to fish on Sunday (Act of April 14, 1937, P. L. 312, sec. 1, as amended, 30 P. S. 265); to remove raccoons and fur-bearing animals caught in hunting traps or deadfalls on Sunday (Act of June 3, 1937, P. L. 1225, Art. VII, sec. 702, as amended, 34 P. S. 1311.702); and for a private club, but not a restaurant or hotel, to sell liquor to its members on Sunday (Act of April 12, 1951, P. L. 90, Art. IV, sec. 406, as amended, 47 P. S. 4-406).

statute which the Legislature may provide for under the Commonwealth's police power. It is clear that in order to be valid on this basis the Act of August 10, 1959, must constitute a *proper* exercise of the police power which is inherent in the Legislature of a sovereign state. The basis of the exercise of the police power and the limitations thereof were defined by Mr. Justice (now Chief Justice) Jones in *Hertz Drivurself Stations, Inc. v. Siggins*, 359 Pa. 25, 47-48 (1948) as follows:

> "In any circumstances, an exercise of such power, if it is to be valid constitutionally, must bear a reasonable relation to a lawful end sought to be attained thereby. In short, the police power can never be exerted legally except it be exercised in the public interest. Consequently, unless a given exercise of the power promotes or tends to promote the public safety, health, morals or welfare, it is without constitutional sanction. For a legitimate exertion of the police power there must be 'a reasonable and substantial relation between the thing acted on and the end to be attained, one that promotes health, safety or general welfare, necessary to the common good, and a reasonable demand for regulation, not one that is merely an unnecessary "experimentation (or interference) with the fundamental rights of the individual": *Truax v. Corrigan*, 257 U. S. 312, 338'."

It is well settled that no Legislature may exercise the police power under the guise of protecting the public interest and thereby arbitrarily interfere with private business by imposing unreasonable and unnecessary restrictions upon lawful occupations. In *Commonwealth v. Zasloff*, 338 Pa. 457 (1940), former Chief Justice Stern said, at page 460:

> ". . . in these, as in all cases, the police power is not unrestricted; its exercise, like that of other governmental powers, is subject to constitutional limitations and judicial review, otherwise we would have an ab-

solute instead of a constitutional scheme of government. It has frequently been stated by federal and state courts alike that a law which purports to be an exercise of the police power must not be arbitrary, unreasonable or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the object sought to be attained: (citations omitted). The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations: (citations omitted). While it is for the legislative branch of government to enact such measures as it deems desirable for the advancement of the public welfare, the judiciary is the ultimate authority to determine whether constitutional restraints have been violated, confining itself, of course, to the question, not of legislative policy, but of legislative power: (citations omitted) . . . ".

It seems clear that the statute in question is arbitrary and unreasonable on its face. The Act does not prohibit all commercial activity on Sunday but prohibits only sales *at retail*. Therefore, the Act in question permits a man to engage in the manufacture of clothing on Sunday but prohibits a man from selling that same article of clothing on Sunday. It permits a sale of furniture at wholesale on Sunday but prohibits a sale on Sunday of the same article of furniture at retail. We can see no valid reason or justification for the Legislature to draw a distinction between a retail sale and any other type of commercial activity. If the Act is designed to provide a day of rest for the citizens of this Commonwealth (even assuming that the Legislature could impose restrictions upon commercial activity on one particular day) it would certainly seem that employees of wholesale establishments, factories and service establishments need their rest as much as do employees of retail stores.

Moreover, an act which permits the Sunday sale of articles at wholesale but prohibits the Sunday sale of articles at retail violates the constitutional requirement that "a statutory discrimination must be based on differences that are reasonably related to the purpose of the Act in which it is found." *Morey v. Doud*, 354 U. S. 457, 465 (1957); *Smith v. Cahoon*, 283 U. S. 553, 567 (1939).

The Supreme Court of the United States has held in the case of *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 406 (1928) that:

> ". . . classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible."

In addition, the New Sunday Blue Law does not prohibit the retail selling on Sundays of all goods and commodities but only prohibits the retail selling of certain enumerated articles and commodities and for this reason, also, it is arbitrary and discriminatory. For example, one is prevented by the Act from selling a customer a toy for his child but not candy for his wife. The Act prohibits the selling of a rake, but not grass seed. The Act does not prohibit the sale on Sunday of a house which may contain all sorts of kitchen equipment but does prohibit the retail sale of a ten cent can opener to be used in the kitchen. We could multiply these illustrations a hundredfold to point out the incongruity of the Act in this respect. We are at a loss to understand how these distinctions can be justified on the basis of a valid exercise of police power.

In our opinion the New Sunday Blue Law is clearly not an exercise of valid police power but by virtue of its arbitrary and unreasonable classifications violates those sections of the Pennsylvania Constitution which prohibits the Legislature from passing any local or special law regulating labor, trade, mining or manufacturing (Article III, sec. 7), and which guarantee all men the right of acquiring, possessing and protecting property (Article I, sec. 1).

In addition, it is our opinion that the New Sunday Blue Law also violates the Constitution of the United States in that it constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment. It denies to plaintiff the equal protection of the law guaranteed by that amendment. See *Crown Kosher Super Market v. Gallagher, supra,* in which the Court stated:

> ". . . the objection is well taken that in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of liberty, without due process of law, contrary to the Fourteenth Amendment." (Citations omitted.)

We next turn our attention to the serious question of whether the Act of August 10, 1959, violates Article I, section 3, of the Pennsylvania Constitution which provides:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and *no prefer-*

ence shall be given by law to any religious establishment or modes of worship." (Emphasis added.)

and the First Amendment of the Constitution of the United States which provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .",

and which is applicable to Pennsylvania by virtue of the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

While the statute under consideration does not specifically mention religious observance and religious beliefs, the effect of the statute clearly discriminates against certain religious groups in that it commands all citizens of the Commonwealth of Pennsylvania to abstain from certain commercial retail activity on Sunday, irrespective of their individual religious beliefs which may require religious observance of a different day. (See Finding of Fact No. 10).

If the Legislature desired to set aside one day of the week as a uniform day of rest, it would certainly seem that no exceptions to the general prohibition against commercial activity would have been permitted. In addition, the Commonwealth of Pennsylvania has already enacted a pattern of economic laws under the police power regulating hours of work, which operate independently of the Sunday Laws. They include such statutes as Act of July 25, 1913, P. L. 1924, sec. 3, as amended, 43 P. S. 103(a), (women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, sec. 4, as amended, 43 P. S. 46 (persons under the age of eighteen cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, sec. 1, 43 P. S. 361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, sec. 1, 43 P. S. 481 (employees of motion picture theatres must be given one day of rest per week).

Finally, in this connection we come to the point previously referred to in this opinion namely, if this Act is simply a "day of rest" statute and not a "religious" statute, on what reasonable or rational grounds can the "crazy-quilt" pattern of prohibiting only retail selling in general and only retail selling of certain items in particular be justified? Surely, those who are engaged in commercial activity other than retail selling need their day of rest as well as the clerks who sell at retail the items enumerated in the Act of 1959. It is thus clear that the Act is not a day of rest statute but is religious in origin and nature.

Regardless of the basis used for sustaining the validity of prior Sunday Blue Laws it is now clear that the standard by which any Sunday Blue Law must be judged is set forth in *McCollum v. Board of Education*, 333 U. S. 203, 210-11 (1948), where the Court said:

> "Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church or attendance or nonattendance. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'"

The doctrine of the separation of Church and State embodied in the First Amendment of the United States Constitution and the comparable section of the Pennsylvania Constitution require us to hold the Act of August 10, 1959, void and unconstitutional on this ground also.

There is one further aspect of this matter that we deem it necessary to consider. The record supports the plaintiff's assertion that it is the established policy of the Police

Commissioner to enforce the Act of 1959 only against employees of certain large retail establishments such as discount houses and farmers' markets. This has been accomplished by sending members of the police department in plain clothes to the large retail establishments where they make purchases of items prohibited by the Act to be sold at retail on Sunday. As a result of these purchases arrests are then made.

The Police Commissioner explained that the reason for this discrimination in enforcement is due to the Police Department's lack of sufficient funds and manpower to enforce the Act fully and adequately as to every retail establishment in the city. Thus, we have the undesirable situation in Philadelphia of a law being enforced only against a few retail establishments while many other such places of business continue their Sunday activities in complete disregard of the law.

Of course, the fact that a particular law may not be enforced uniformly does not, of itself, raise any constitutional question. If one is arrested because of criminal activity he cannot complain that the law is unconstitutional simply because someone else who has violated the same law has not been arrested. But, in the instant case, an additional and extremely important factor is present. The admitted discrimination in enforcement is a calculated result of a definite policy on the part of a public official and thus results in a denial to the plaintiff of the equal protection of the law to which it is entitled by virtue of the Fourteenth Amendment of the United States Constitution.

The leading case in this area is that of *Yick Wo v. Hopkins*, 118 U. S. 356. The opinion in that case was delivered by Mr. Justice Matthews speaking for the unanimous Supreme Court of the United States and we consider his language extremely apposite to the case at bar:

> "In the present case we are not obliged to reason from the probable to the actual, and pass upon the

validity of the ordinances complained of, as tried merely by the opportunities which their terms afford of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

A more succinct statement of the same principle appears in the case of *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352, in which Justice McReynolds stated:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

It is clear that the New Sunday Blue Law places a difficult burden on the Police Department of the City of Philadelphia, and to enforce it against all retail merchants

would necessitate the transfer of large numbers of police personnel from other important duties. The fact remains, however, that the present policy of selective enforcement is unconstitutional discrimination.

Therefore, for all of the reasons set forth in this adjudication, we are constrained to hold that the Act of August 10, 1959, P. L. 212, 18 P. S. 4699.10, is unconstitutional and, therefore, void.

The Chancellor makes the following

CONCLUSIONS OF LAW.

1. The Act of August 10, 1959, is unconstitutional in that it is violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

2. The Act of August 10 1959, is unconstitutional in that it is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

3. The Act of August 10, 1959, is unconstitutional in that it is violative of the First Amendment of the United States Constitution as applied to Pennsylvania by the Fourteenth Amendment of the United States Constitution.

4. The Act of August 10, 1959, is unconstitutional in that it is violative of Article I section 1, of the Pennsylvania Constitution.

5. The Act of August 10, 1959, is unconstitutional in that it is violative of Article I, section 3, of the Pennsylvania Constitution.

6. The Act of August 10, 1959, is unconstitutional in that it is violative of Article III, section 7, of the Pennsylvania Constitution.

In accordance with the foregoing we enter the following

DECREE NISI.

AND Now, to wit, this 10th day of June, 1960, it is

ORDERED, ADJUDGED AND DECREED.

1. That the Act of August 10, 1959, P. L. 212, 18 P. S. 4699.10, is unconstitutional and, therefore, void.

2. That defendants and their agents are permanently restrained and enjoined from arresting or threatening to arrest any of the employees of the plaintiff corporation or of plaintiff's concessionaires at plaintiff's store located at Twenty-third Street and Passyunk Avenue, Philadelphia, Pennsylvania, for violation of the Act of August 10, 1959.

3. That the costs of these proceedings shall be paid by the defendants.

The Prothonotary is directed to enter this Decree Nisi, and to give notice thereof to the parties or their counsel of record, and unless exceptions are filed within 20 days thereafter, this Decree Nisi shall become the Final Decree, as of course.

By THE COURT:

ETHAN ALLEN DOTY,
J.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. [redacted] 26

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,

Appellant,

vs.

[illegible] A. McGINLEY, District Attorney, County of Lehigh, [illegible] Deputy District Attorney, and GEORGE J. JOSEPH, Solicitor, County of Lehigh, Pennsylvania, Individually and as Official Defendants,

Appellees.

APPEAL FROM THE FINAL ORDER OF A THREE JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. SEC. 2281 ET SEQ.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

LAWRENCE SPEISER,
[illegible] 19th Street, N. W.,
Washington, D. C.,

ROWLAND WATTS,
170 Fifth Avenue,
New York 10, N. Y.,

JACOB S. RICHMAN,
[illegible] South 19th Street,
Philadelphia 3, Pa.,

Counsel for American Civil Liberties Union, Amicus Curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.
No. 699.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

vs.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,
Appellees.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS AMICUS CURIAE.

STATEMENT OF INTEREST.

The American Civil Liberties Union appears *amicus* with consent of the parties in support of the position advanced by the appellant, "Two Guys from Harrison-Allentown, Inc.", having appeared in the same position in the courts below. This brief seeks to avoid mere reiteration of appellant's presentation.

The American Civil Liberties Union is a non-profit, non-

partisan organization dedicated to the protection and advancement of the rights guaranteed in the Constitution of the United States and particularly in the Bill of Rights.

One of the most important rights granted by the United States constitution is that relating to the prohibition of the establishment of religion and the freedom of religion under the First Amendment. In relation to the Sunday laws restricting the right of persons to labor on Sunday and to sell legitimate merchandise on Sunday, state legislatures have declared that these laws do not purport to be laws relating to religion but are really laws designed to protect the health and welfare of the population by limiting their right to labor to six days per week and restricting the sale of merchandise to six days per week, and are alleged to be constitutional under the police power. This is patently a subterfuge to hide the real purpose of the legislation, namely,—to set aside Sunday as the Christian Sabbath so as to insure its religious observance for the majority of the American population, Willis, Constitutional Law (1936), p. 749, and "the truth is, however much it may be disguised, that this one day of rest is a purely religious idea," Terry, C. J. in *Ex parte Newman*, 9 Cal. 502, 509 (1858); Konvitz, Fundamental Liberties of a Free People, 75 (1957); Comment, 64 Harvard L. Rev. 1194, 1195 (1951). Because others are attacking Sunday Laws on religious grounds under the First Amendment, a position with which the American Civil Liberties Union is in accord, this brief will be devoted to the issues of the freedom to contract to sell one's labor and to use one's property for the purpose of selling on any day of the week, rights protected by the Fourteenth Amendment.

STATEMENT OF THE CASE.

The Penal Code of the Commonwealth of Pennsylvania, Act of June 24, 1939, P. L. 872 as amended in 1959, contains two general provisions relating to employment and business, Sec. 699.4, 18 Purd. Stat. §4699.4, and to selling at retail, §699.10, 18 Purd. Stat. §4699.10. These statutes, when and if enforced, would prevent on Sundays the plaintiff corporation from selling its merchandise and its employees from working in its retail store in Lehigh County, Pennsylvania. The plaintiff sought an injunction to prevent the defendant, the District Attorney of Lehigh County, from enforcing these laws against the plaintiff and its employees. The store is open for business seven days of the week, although no employee works more than six days per week. About one-third of its business is transacted on Sunday. After a hearing, a statutory three-judge court, with one dissent, denied the request for relief of the plaintiff which filed its appeal to the Supreme Court.

THE QUESTION TO WHICH THIS BRIEF IS ADDRESSED.

This brief is addressed solely to whether a Sunday closing law which compels a legitimate business to close one day a week and which prohibits a person from working on Sunday is such an unlawful limitation of the right to contract and to use one's property as to violate the Fourteenth Amendment of the United States Constitution.

ARGUMENT.

A State legislature may require one day of rest in seven, but may not constitutionally deprive a person of the liberty to choose the day of the week on which he shall refrain from laboring or selling by requiring him to desist only on Sunday.

For the purpose of this argument, we will accept the contention that Sunday Laws are solely "civil legislation" and are not religiously inspired or motivated. We assert the constitutional invalidity of Sunday Laws, however, on the ground that although the legislature, under its police power, may require each individual to desist from work for at least one day per week, it may not constitutionally designate the particular day of the week for universal rest. Even if a statute "made Monday, instead of Sunday, a day of compulsory rest, the constitutional question would have been the same", Burton, J., concurring opinion, *Ex parte Newman*, 9 Cal. 502, 513 (1858). A state law may not require a business for one day in seven to close its doors or to refrain from selling its merchandise. A statute may limit the freedom of an individual to contract to sell and to sell his labor for seven days a week but it may not deprive the individual of his right himself to choose the day on which he will refrain from labor. A statute may not limit the freedom of a person, individual or corporate, to sell merchandise seven days per week under the guise of requiring that business to remain idle at least one day per week.

A. At common law all business may be transacted on Sunday.

"By the common law all judicial proceedings on Sunday were forbidden. Any other business could lawfully be

transacted", *Ward v. Ward*, 77 N. W. 965 (Minn. 1899). See also *Commonwealth v. Foster*, 28 Pa. Superior Ct. 400 (1905); *Commonwealth v. Teaman*, 1 Philadelphia 460, 461 (1853). Statutes are required, therefore, to make Sunday business illegal, subject, however, to the absence of any constitutional inhibition.

B. State may require one day of rest in seven but may not determine the day for universal rest.

It is generally conceded that the human being needs at least one day of rest each week to meet his physical need for regeneration. It is further recognized that some people ignore this urgent need as a result of which the State for its own protection must compel such persons to desist from work periodically. The law, in its awareness of the problem, enables the legislature under the police power to require each person to desist from labor one day in seven. The claimed purpose is "to protect all persons from the physical and moral debasement which comes from uninterrupted labor", *Soon Hing v. Crowley*, 113 U. S. 703, 710 (1885). "It is upon that basis that the prevalent type of Sunday law is sustained," *Two Guys from Harrison v. Furman*, 160 A. 2d 265, 273 (1960). "It establishes, as a civil regulation, a day of rest from secular pursuits, and that is its only scope and purpose," Field, J. dissent in *Ex parte Newman*, 9 Cal. 502, 519 (1858). Its "object mainly was to protect the employees by insuring them a day of rest," *Petit v. Minnesota*, 177 U. S. 164, 168 (1900). This restriction on the right to work on Sunday, however, constitutes a limitation upon the liberty of the individual which is justified by the community's need to protect the health of its constituents even though involuntarily imposed.

The Supreme Court of the United States in the three early decisions of *Soon Hing v. Crowley*, supra, *Hennington v. Georgia*, 163 U. S. 299 (1896), and *Petit v. Minnesota*,

supra, upheld the right of a State to prohibit Sunday labor. In the *Hennington* Case, the Court justifies the right to designate Sunday as a universal day of rest, in the following language:

> "The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness, and health of the people, it was within its discretion to fix the day when all labor, within the limits of the state, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor" at page 304.
>
> "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regular recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest" at page 305.

It is not contended that it is "for the judiciary to say that the wrong day was fixed" when Sunday was chosen, but it is for the court to say that the legislature may not constitutionally fix a particular day to rest from labor each week.

1. *Each person may choose for himself a day of rest which best meets his needs and desires.*

While the legislature may require a day of rest in seven, it is not within the competency of the legislature to fix the day of rest, and the Supreme Court of the United States as constituted in 1896 was in error when it so declared without demonstrating by authority, logic and reason that the

legislature possessed the right to designate a specific day for rest and not allow the individual to determine for himself the day upon which he wishes to desist from labor, a day which best accords with his religious convictions or his economic or social desires.

The right of self-determination is aptly stated in the flag salute case by Justice Jackson in *W. Va. Board of Education v. Barnette*, 319 U. S. 624, 630 (1943):

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. . . . The sole conflict is between authority and the rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on *the right of self-determination* in matters that touch individual opinion and personal attitudes." (Emphasis ours.)

2. *Requiring universal rest from labor on Sunday has no necessary or reasonable relationship to the need to rest one day a week.*

Sunday laws impose two limitations upon the liberty and freedom of the individual. One is the proper restriction on the common law right of each person to work every day of the week. The other is the limitation on his right to choose the day of the week on which he shall take his rest. The real issue is whether the State may further limit the individual's liberty and freedom by withdrawing from him the freedom to choose the day. Is there a necessity to specify a day? If the purpose is to assure a day of rest in seven, then there is no need to require a particular day since the

object is to provide the twenty-four hours of rest regardless of the day.

The Supreme Court of Pennsylvania makes the following declaration on the exercise of the police power:

> "By a host of authorities, Federal and State alike, it has been held that a law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts," *Gambone v. Commonwealth*, 375 Pa. 547, 551-2 (1954); *Commonwealth ex rel. v. Sun Ray Drug Co.*, 383 Pa. 1, 10-11 (1955).
>
> "The valid exercise of the state's police power requires that there be a substantial nexus between the end to be achieved and the legislation enacted for that purpose, accomplished without interference with the fundamental rights guaranteed to the individual," Sunday Laws, 25 Southern California L. Rev. 131, 134 (1952).

The only justification for legislative choice of one day applying to all is the difficulty of enforcement. Thus in *State of Ohio v. Ullner*, 143 N. E. 2d 849, 105 Oh. App. 546 (1957), at 851-2:

> "But it is said that while requiring the observance of one day out of seven as a day of rest is a valid exer-

cise of the police power, that power does not authorize the fixing of a specific day of the week as a day of rest. . . .

"If designating a specific week day as the day of rest is beyond the power of the legislature, it must be for some other reason. We do not think that the legislature is required to assign a reason for fixing a specific day, rather than leaving it to individual choice. We think valid reasons could be stated. In passing legislation, it is a proper object to consider the ease or difficulty of enforcement. Now certainly the power to enforce the observance of a specific day of rest would be much easier than to enforce a day of rest selected by the individual. It would seem that the latter would not only be difficult but in fact impossible to enforce."

The Superior Court of Pennsylvania in *Commonwealth v. Bauder*, 188 Pa. Superior Ct. 424, 426 (1958), in a per curiam opinion adopts the language of the lower court in 14 Pa. D. & C. 2d 571, 579, as follows:

"It appears to us that there is: (1) A valid reason to select one specific day upon which all persons shall rest; and (2) a reason not advanced in the Specht case why Sunday should be that day. The two reasons serve one purpose, namely, ease of enforcement.

"If the day of rest chosen is one which the great majority of people are already bound by conscience to observe, the State will have the sanction of conscience as well as the fear of punishment as a motive for enforcement of its policy of relief from labor. Everyone connected with the enforcement of law can testify to the support given to the maintenance of law and order by those who obey the law from conscience rather than from fear of punishment.

"It can readily be seen that selecting a specific day greatly aids in the enforcement of the law. If a person is found engaging in worldly employment on a Sunday,

> he is guilty. He is also more conspicuous and easier to detect than he would be if others were legally employed in the same occupation on that day. To permit a person to rest on a day of his own choice would compel the Commonwealth to prove which was the day of his choice and that he had not rested on that day or if he had no day of his own choice to prove that he had worked on each of the other six days of the week. Any such requirement would practically nullify the law."

The fact that the requirement of one day of rest in seven with the individual choosing the day would cause inconvenience in enforcement is not sufficient reason to take the right of choice of day of rest from the individual. Thus, in *Commonwealth v. Tagola*, 89 Pittsburgh Law Journal 187 (Penna. 1941), an ordinance limited the hours a barber shop could keep open. The Court states:

> "The contention that adequate inspection will be impossible if the shops are open at all hours is manifestly untenable; perhaps adequate inspection may require either a larger force of inspectors or a division of the force. These, however, are mere matters of convenience for the city. They do not constitute a standard for determination and afford no basis for an otherwise unwarranted interference with the use and control of the property of the complainants."

The Supreme Court of the United States has concerned itself with the problem of extending the permissible scope of a restrictive regulation to innocent acts in order effectively to enforce the law against the evil toward which the law is directed. Thus in *Carolene Products Co. v. United States*, 323 U. S. 18 (1944), it was held that only if there was no other way to enforce the law other than by prohibiting the sale of a wholesome article, could the restriction be applied to innocent acts, citing and distinguishing *Weaver v. Palmer Bros. Co.*, 270 Pa. 402 (1926). In the

latter case a Pennsylvania statute prohibited the use of shoddy in the manufacture of comfortables. Plaintiff in using shoddy sterilized the material so as to render it harmless. It was also shown that no deception could occur because of adequate provisions for inspection of the places of manufacture and sale, and for tags to be applied to the comfortables to clearly identify the nature of the filling. The court declared the prohibition invalid, declaring at page 415:

> "The constitutional guaranties may not be made to yield to mere convenience. Schlesinger v. Wisconsin, decided March 1, 1926, 270 U. S. 230. . . . The business here involved is legitimate and useful; and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the 14th Amendment. . . ."

So also in *Schlesinger v. Wisconsin*, 270 U. S. 230 (1926), the State of Wisconsin sought to tax all gifts made within six years of death as conclusively made in contemplation of death without regard to the actual intent. Wisconsin attempted to justify this on the ground that this was necessary for effective enforcement "to prevent evasion of inheritance taxes. The court struck this provision down in the following language at page 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is for-

bidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

It is our contention that a "one day of rest in seven" law can be effectively enforced, leaving the choice to the individual, without the need to prohibit all work or selling on Sunday as a universal day of rest. There is nothing inherently wrong in laboring on Sunday and, therefore, it may not be forbidden on the theory that only by making Sunday work illegal can one achieve the laudable purpose of requiring each person to rest one day per week.

a. One Day of Rest in Seven Laws.

If the sole purpose of the Sunday Laws is to assure to each individual at least one day of rest in seven, this avowed goal can be effectively achieved and adequately enforced under a "one day of rest in seven" law, thereby obviating the necessity of legislatively decreeing a specific day.

"One day of rest in seven" laws are not difficult of enforcement. Five states (Arizona, California, Oregon, Wisconsin and Wyoming) have repealed their Sunday Laws and have replaced them "with statutes requiring one day of rest in seven, without signifying the day : . .", Sunday Laws, supra, at page 134. Nevada has no Sunday Law but has a six day a week law. Connecticut, Illinois, Kentucky, Massachusetts, New Hampshire, New York and Pennsylvania have one day of rest in seven laws for certain industries and businesses and employees, although they have general Sunday Closing Laws. For a compilation of these laws see *Commerce Clearing House*, 4 and 4A Labor Law Reporter—State Laws.

The law is effectively enforced by requiring the posting of a list of employes required to work on Sunday and designating other particular days of rest for each and filing

a copy with the Commissioner of Labor, filing a copy of every change, and further keeping records of hours worked each day by each employe. See *People v. Klinck Packing Company*, 214 N. Y. 121, 108 N. E. 278 (1915). Other States requiring twenty-four consecutive hours of rest in every week, provide also for such posting, filing with Director of Labor, keeping of Time Books, and prohibiting such employee to work on his designated day of rest, and penalty for each offense. 48 Ill. Anno. Stat., §§8a-8g; 4B Ann. Laws of Mass., §§47-52; Rev. Stat. New Hampshire, 1955 Ch. 275, §§32, 33. Pennsylvania requires that every employee of a motion picture theatre, 43 Purd. Stat. §481, and every projectionist, 4 Purd. Stat., §60, shall have 24 consecutive hours of rest each week. Most states provide for a six day week for females and minors, the enforcement of which laws is placed into the effective jurisdiction of Departments of Labor, See State and Federal Hours Limitations, Bulletin No. 116, U. S. Department of Labor (1950).

The substitution of "one day of rest in seven" laws for Sunday Rest Laws has been approved by many students of the subject. Czarra, Sunday Statutes in a Modern Community, 61 Yale L. J. 427, 433-4 (1952):

> "Clearly, Sunday Statutes are undesirable in a modern community. Since the Supreme Court has declined to treat the problem on the constitutional level, the only remaining remedy is repeal. A program for legislative action should have three phases. First, repeal of all statutes prohibiting or regulating business, labor or other activity on Sunday. Second, enactment of a statute providing that in every week each person must receive at least one day of rest and that each business must close at least one day, except in emergencies. This is necessary to supplement federal wage and hour laws where state regulation of interstate commerce is lacking or insufficient. Third, enactment of a statute prohibiting any wilful disturbance of a religious meeting whenever held. In addition, conscientious and

effective enforcement of existing peace statutes is essential to protect the community right to quiet and repose. Such a system would eliminate the religious overtones of Sunday Statutes while accomplishing their legitimate civil objectives. Effective utilization of leisure time will be permitted and the statute books will be rid of the burden of archaic laws which no longer reflect community mores."

Comment, 5 Villanova L. Rev. 308, 310-1 (1960).

"Unquestionably a periodic day of rest is important to strengthen the mental, physical and moral fiber of the community; however, the reasonableness of these statutes must be tested in balancing the interest in free exercise of religion against the police power interest sought to be advanced and the availability of alternative techniques for accomplishing the same purposes. The availability of acceptable alternatives is evidenced by the Sunday statutes containing exceptions which make them inapplicable to religious groups whose sabbath occurs on a day other than Sunday. Even Sunday statutes containing exception clauses of this nature seem to be a poor solution, when it is apparent that the religious objections can be remedied and the same health and welfare purposes achieved by enacting a statute which provided for one day's abstention from labor or business but leaves the choice of the particular day to the individual."

Note, 21 Univ. of Pitts. L. Rev. 123, 131 (1959).

"Clearly the only unobjectionable type of statute for a day of rest is the one that requires one day in seven for rest without specifying any particular day. The American Federation of Labor favors this type of law which leaves to each individual the right to select his own day of rest and the manner of its observance.

"Such legislation would constitute civil legislation and make for religious liberty. It would leave the religious element out of the question and this is perhaps the logical way to dispose of the Sunday law question."

A. H. Lewis, Sunday Legislation (1902), p. VIII, refers to a new approach to the problem of Sunday as an involuntary day of rest; "a new departure which will secure permissive and protected rest to each employed person for one day in the week, the day being determined by the employed person and the employer."

Some writers, Note, Sunday Laws, 73 Harv. L. Rev. 729, 740-1 (1960) and Comment, 6 Utah L. Rev. 581, 585 (1959), generally approve "one day of rest in seven laws" as an alternative to Sunday Laws provided that it can be demonstrated that the former laws are adequately enforceable. These latter writers, however, should not be too deeply disturbed for there are many factors in existence to render these laws effective.

Since the United States is a religious nation, the large majority of people will refrain from work one day per week in consonance with their religious convictions. Others will adhere to a six day week under the theory that "man tends to protect himself from overwork." Wolf, Blue Law Blues, 32 Rocky Mountain L. Rev. 243, 245 (1960). "Without governmental compulsion, most people would probably still eschew a seven-day work week, and their individual inclination would in many instances be reinforced by trade association or union power," Note, Sunday Laws, supra at page 740-1. "Modern-day unions and social legislation generally act to afford repose from uninterrupted labor and refute Justice Field's argument upholding Sunday legislation based upon capital's oppression of the laboring masses", Wolf, supra at page 245. "The deterrent effect of penalty rates on the extensions of work over the week-end holidays" induces "tendency to limit work on week-ends,"

Saturday and Sunday Pay Provisions of Union Agreements in Twelve War Industries (U. S. Dep't of Labor, 1942) 2, as does the overtime pay provisions of the Federal Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A. §207, and the 5-day, 40-hour-week provision in the normal, bargained labor agreement, Goldner, Hours of Work (1952) p. 15; Stieber, Non-Wage Aspects of Collective Bargaining, 8 Business Topics 26, 33 (1960), in most industries, a regular Monday through Friday workweek being prevalent, Collective Bargaining-Week-end Work (U. S. Dep't of Labor Bulletin No. 908-2, 1948) p. 29. In addition to all this, a "one day of rest in seven" law providing for posting the premises, notifying the state Director of Labor or local authorities, keeping time records, adequate penalties, and conscientious enforcement, will result in effective and meaningful legislation, free of any religious overtones or minority resentment.

b. *Exemption of observers of other Sabbaths.*

Sixteen states and England have Sunday Laws with exemptions for persons observing other days as their Sabbath. These are Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, New Jersey, New York (except public selling), Ohio, Oklahoma, Texas and West Virginia. Some require that they notify the District Attorney, that they do not disturb others attending public worship, that they may not operate a business within a certain distance of church services, and that they do not compel employees of a different belief to work on Sunday. These laws are easily enforced by providing that the shopkeeper must close his place of business on Saturday, give notice to the local authorities of his intention to do so and post notice of this practice in the shop, see Skottowe, the Law Relating to Sunday (London, 1936).

The widespread prevalence of Sabbath exemption provi-

sions constitutes clear proof that Sunday Laws are not necessary to assure a respite from work one day per week, especially for those who are sincere in their religious beliefs.

c. *Hours of work laws.*

All states have enacted laws relating to hours of work and most of these apply to women and minors. Many of them also limit the number of days per week in which they may work, ordinarily not more than six. See State and Federal Hours Limitations, supra. Others go further and forbid such work during the night, *Radice v. New York*, 264 U. S. 292 (1923). All these laws contain provisions for the enforcement and there is no reason to believe that they have not been effective or that the investigating and inspection arms of the enforcement agencies cannot properly and adequately compel a "one day of rest in seven" law.

If, therefore, for many years there have existed, in the statute books of this country, laws limiting hours of work, exempting from Sunday laws observers of other Sabbaths and "one day of rest in seven" laws, which from all available evidence are operating satisfactorily and being properly enforced, there is, therefore, no need for a law compelling universal rest on Sunday and depriving the individual of the right to choose for himself the day upon which he will desist from labor. The existence of these statutes with their enforcement provisions and penalties clearly demonstrates that there is no need for Sunday Laws "to protect the employees by insuring them a day of rest" or "all persons from the physical and moral debasement which comes from uninterrupted labor."

3. If alternative methods are available to achieve a desired goal, that method must be used which entails less deprivation of constitutional rights.

If alternative methods are available for attaining a desired end, the fact that one entails a greater deprivation than the other is a factor for consideration in the validity of the legislative choice, Dowling, Cases on Constitutional Law (6th ed.) p. 714, citing *Weaver v. Palmer Bros. Co.*, 270 U. S. 402 (1926); see *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951). If a legislative goal can be achieved at a lower price in terms of limitation of rights of individuals that choice must be made which least interferes with these rights, (Note) Consideration of Facts in Due Process Cases, 30 Columbia Law Review 360, 362 (1930).

The Supreme Court of the United States approved this principle in *Dean Milk Co. v. Madison*, 340 U. S. 349 (1951). In this case the City of Madison enacted an ordinance forbidding the sale of milk in the city as pasteurized unless it had been pasteurized and bottled at an approved pasteurization plant within five miles of the center of the city. The appellant's plant was more than 5 miles away. The court declared the ordinance unconstitutional as unjustifiably discriminating against interstate commerce in violation of the commerce clause of the Federal Constitution. The court found that the city could send inspectors to plants outside the five-mile limit and charge the costs to the plant. Since this alternative method of inspection existed, the five mile limitation was unreasonable and invalid. The court declared:

> "Even in the exercise of its unquestioned power to protect the health and safety of its people, a municipality may not erect an economic barrier protecting a major local industry against competition from without the state, if reasonable non-discriminatory alternatives, adequate to conserve legitimate local interests, are available."

Justice Black dissented on the ground that the "reasonable alternative" concept should apply only to First Amendment rights. In view of the fact that freedom of religion is involved in the instant case, it is reasonable to assume that Justice Black would not hesitate to apply this salutary doctrine to invalidate Sunday Laws.

In the case of *W. Va. Board of Education v. Barnette*, supra, the school board sought to justify compulsory flag salute as a method to "inspire patriotism and love of country". The court struck it down by declaring that a satisfactory alternative existed by teaching these concepts directly through history and civics without depriving a child of its right to maintain its religious convictions.

See also the opinion of Judge Alexander in the Sunday Law cases of *Commonwealth v. Cavalerro and Levenston*, Court of Quarter Sessions of Philadelphia County, Pennsylvania, The Legal Intelligencer, April 22, 1960, p. 1, 12, f.n. 6:

> "(b) *Many states . . . have one-day-in-seven rest laws. . . . and I know of no problem in connection with their enforcement,* or with the enforcement of the labor laws referred to in (a) above. Indeed, such laws generally are enforced, whereas the sporadic or discriminatory enforcement of the Sunday laws is common knowledge, and tends to bring law enforcement generally into disrepute. (c) *Where there are two methods of accomplishing the legislative purpose, that which involves less interference with business or personal liberty must be used, and mere ease of enforcing a more restrictive alternative will not sustain it.*" See, e.g. *Kovacs v. Cooper*, 336 U. S. 77, 88 (1949). (Emphasis ours.)

As adverted to above, a "one day of rest in seven" law is a reasonable, non-discriminatory alternative to Sunday Laws as a result of which the latter should be declared unconstitutional.

CONCLUSION

Our laws generally are directed not to the right of an owner to sell his goods, but to the manner in which he may sell them, *Commonwealth v. Gardner*, 133 Pa. 284 (1890). It is a false idea that the time of an act could have anything to do with its moral nature, all other things being equal, Ringgold, the Law of Sunday (1891), p. 73. It is unthinkable that there is a power in the State, absent as to secular days, to limit a right solely on Sunday, *Brattle Films v. Commissioner of Public Safety*, 333 Mass. 58, 127 N. E. 2d 891 (1956). The legislature may not arbitrarily limit the time when an otherwise legitimate sale may be made, but may restrict the manner in which the sale is made in order to protect the community.

Thus if the desired legislative purpose is to provide compulsorily one day of rest in seven, then the legislature in choosing a technique to accomplish this purpose, having a choice of two methods of reaching its goal, must choose that one which least interferes with the constitutional rights of the individual consistent with effective enforcement. For if effective enforcement is absent, the goal is not achieved. If, therefore, the legislative purpose is to assure a day of rest each week, it is sufficient for the legislature to declare that no one may work more than six days a week, and to permit the individuals concerned, by contract, to determine which day of the week shall constitute the day of rest. A survey of the statutes relating to the enforcement of legislation providing for one day of rest in seven, for exemptions from the Sunday law for those observing other days of rest, and for hours of work for women and children, will demonstrate that techniques of enforcement are available in order to accomplish the desired goal, namely, the substantial certainty that the population will be assured under law one day of rest in seven

so that the need to provide rest, recreation, worship and physical revival will be provided.

The old Supreme Court cases upholding Sunday laws based on the police power of the states to pick Sunday as a universal day of rest should be overruled as has been evidenced in recent Supreme Court decisions in matters of great public concern and changed conditions, especially since these cases indicate a failure to consider thoroughly the constitutional question of the right to choose a specific day of rest. The automobile age, the distance of shopping centers from concentrated areas of population, the demands of minorities to observe their own days of rest for purposes of religious worship, the need of the public for manifold forms of recreation and entertainment on their days of rest: all these call upon the judicial arm of our government to protect the right of all men to choose their form of rest and worship and also the time of rest and worship so long as it does not interfere with the right of others to enjoy their days of rest and worship in the manner and at the time they see fit. The changed habits of the people, and the growth of towns and cities in contrast to the essentially village conditions of earlier centuries, the development of motor transport, and above all the effect of two world wars have made the State regulation of Sunday almost an anachronism," Murray, the State and the Church in a Free Society (1958) p. 166.

> "Appellate courts on both state and federal levels have declared it to be a duty as well as a right of the court to re-examine and correct previous decisions which have been shown to be erroneous in the light of later experience or which have been based on conditions which have altered through the passage of time. This flexibility has had most interesting results in such vital areas as civil rights," Moore, Stare Decisis (1958) p. 45.

If there is any situation in which conditions have altered through the passage of time, it is the situation pertaining

to Sunday Laws and the Supreme Court should have no hesitancy in reversing and overruling the old cases supporting them.

Respectfully submitted,

LAWRENCE SPEISER,
1612 Eye Street, N. W.,
Washington, D. C.;
ROWLAND WATTS,
170 Fifth Avenue,
New York 10, N. Y.,
JACOB S. RICHMAN,
43 So. 19th Street,
Philadelphia 3, Penna.,
Counsel for American Civil Liberties Union.

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IN THE

Supreme Court of the United States

October Term, 1960
No. 36

TWO GUYS FROM HARRISON-ALLENTOWN INC.,

Appellant

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees

On Appeal From the Final Order of the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR APPELLEES

HARRY J. RUBIN
Attorney, Pennsylvania Department of Justice
WALLACE C. WORTH, JR.
First Assistant District Attorney, County of Lehigh, Pennsylvania
ANNE X. ALPERN
Attorney General
Counsel for Appellees

Department of Justice
Commonwealth of Pennsylvania
238 Main Capitol Building
Harrisburg, Pennsylvania

Murrell Printing Company, Law Printers, 301-3 Lockhart St., Sayre, Pa.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 36

Two Guys from Harrison-Allentown, Inc.,

Appellant

v.

Paul A. McGinley, District Attorney, County of Lehigh, Pennsylvania, and George J. Joseph, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees

BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (R. 273-290) is reported at 179 F. Supp. 944.

JURISDICTION

This action was brought to have declared unconstitutional under the Fourteenth Amendment to the United States Constitution the Pennsylvania Act of June 24, 1939, Pamphlet Laws 872, §699.4, 18 Pa. Stat. Ann. §4699.4, and the Pennsylvania Act of August 10, 1959, Pamphlet Laws 660, 18 Pa. Stat. Ann. §4699.10. Because the constitutionality of a state statute was questioned and injunctive relief was requested, a three-judge district court was convened pursuant to 28 U.S.C. §2281 and 28 U.S.C. §2284. The final order of the District Court was entered on December 7, 1959. Appellant's Notice of Appeal was filed on December 18, 1959, and its Jurisdictional Statement on February 12, 1960. Probable jurisdiction was noted on April 25, 1960. The jurisdiction of this Court rests upon 28 U.S.C. §1253 and 28 U.S.C. §2101(b).

STATUTES INVOLVED

The statutes involved in this case are two Pennsylvania acts prohibiting certain activities on Sunday. The first is the Act of June 24, 1939, Pamphlet Laws 872, §699.4, as amended, 18 Pa. Stat. Ann. §4699.4, substantially a codification of the Act of April 22, 1794, 3 Sm. L. 177. This statute presently reads as follows:

> "Whoever does or performs any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday (works of necessity, charity and wholesome recreation excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of payment thereof, shall suffer six (6) days imprisonment.
>
> "As used in this section 'wholesome recreation' shall mean golf, tennis, boating, swimming, bowling, baseball, basketball, picnicking, shooting at inanimate objects and similar healthful or recreational exercises and activities.
>
> "Nothing herein contained shall be construed to prohibit the dressing of victuals in private families; bake-houses, lodging-houses, inns and other houses of entertainment for the use of so-

journers, travellers or strangers, or to prohibit the sale of newspapers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or work in connection with the rendering of service by a public utility as defined by the act of May 28, 1937 (P. L. 1053), known as the 'Public Utility Law,' or persons removing with their families on the Lord's Day, commonly called Sunday, nor to the delivery of milk or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day."

Amendments made at the 1959 Session of the Pennsylvania General Assembly added the exceptions for wholesome recreation and public utility work seen in the above language. These were not present in the statute at the time of filing of the original complaint.

The second statute involved is the Act of August 10, 1959, Pamphlet Laws 660, §1, adding §699.10 to the Act of June 24, 1939, Pamphlet Laws 872, 18 Pa. Stat. Ann. §4699.10. The act states as follows:

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof

in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense.

"Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereatfer."

The provision of the Federal Constitution involved is that part of the first section of the Fourteenth Amendment which states as follows:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Is the Pennsylvania Act of August 10, 1959, Pamphlet Laws 660, §1, a law respecting an establishment of religion and thus in violation of the Fourteenth Amendment to the United States Constitution?

2. Is the limitation of the applicability of the Pennsylvania Act of August 10, 1959, Pamphlet Laws 660, §1, to the sale at retail of certain specified goods and commodities an unreasonable limitation and thus violative of appellant's rights to due process of law and to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

3. Are the fines prescribed by the Pennsylvania Act of August 10, 1959, Pamphlet Laws 660, §1, oppressive and thus violative of appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

4. Was appellee McGinley's enforcement of the Pennsylvania Act of June 24, 1939, Pamphlet Laws 872, §699.4, against appellant arbitrary and discriminatory in violation of appellant's right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

5. Did the District Court err in refusing to pass upon the constitutionality of the Pennsylvania Act of June 24, 1939, Pamphlet Laws 872, §699.4?

STATEMENT

Appellant filed its original complaint on November 22, 1958 (R. 1). It alleged that the Pennsylvania Sunday Law (then, just the Act of June 24, 1939, Pamphlet Laws 872, §699.4) violated the Fourteenth Amendment to the Constitution of the United States because (a) it was unreasonably discriminatory and (b) it was an act respecting an establishment of religion (R. 2). It also alleged that appellee McGinley's enforcement of this law was arbitrary and, hence, similarly unconstitutional (R. 2). The relief prayed for was a declaration that both the statute and its enforcement were unconstitutional and the granting of an injunction (temporary until hearing and permanent thereafter) restraining appellee McGinley from arresting or threatening to arrest any of appellant's employees for violation of the Sunday law or for conspiracy to violate the same (R. 2-3). Appellant also asked for a temporary restraining order (R. 3) which request was immediately granted ex parte (R. 4).

Since appellant sought injunctive relief and alleged that a state statute was unconstitutional under the Federal Constitution, it was necessary to convene a district court of three judges. 28 U.S.C. §2281. This was subsequently done pursuant to 28 U.S.C. §2284.

On August 10, 1959, the Pennsylvania General Assembly enacted the second of the two statutes under attack here. This act was not an amendment to the

earlier provision, but was an addition to The Penal Code of June 24, 1939, itself.

Appellant then filed its amended complaint (R. 5-7), similarly attacking the validity of this new act. To this appellee McGinley's answer was filed (R. 8-10). Appellant then received a temporary restraining order with regard to the 1959 act (R. 10-11), following a hearing (R. 11-42).

The final hearing was held on October 13, 1959 (R. 43-257). At the hearing appellant presented the testimony of Dr. Sidney B. Hoenig of Yeshwa University (R. 57) concerning the origin, development and effect of Sunday observance and legislation. In summary form, Dr. Hoenig's testimony indicated that the seventh day of the week or Saturday is the Sabbath day and the day of rest of the Jews (R. 58-60), that Sunday observance arose to commemorate the resurrection of Jesus which occurred on the first day of the week (R. 61-62), that Sunday was referred to as the Lord's Day and was not originally observed as a day of rest (R. 63).

Dr. Hoenig went on to testify that enforced Sunday observance was first decreed by the Roman Emperor Constantine (R. 66-68) although no connotation of Sunday as a day of rest really appeared until several centuries later (R. 69-71). Today, Dr. Hoenig felt that to compel a Jew to observe Sunday is to force a Christian observance upon him (R. 73).

In exploring the Jewish notion of the Fourth Commandment on cross-examination, Dr. Hoenig indicated that Sabbath observance was the vital thing (R. 77) and that the command to work on the other

six days was not an inflexible injunction to carry out one's usual activities throughout the six days (R. 76-77). Thus, for example, the campaign for a five-day work week (Monday through Friday) has not been objected to (R. 77) as long as Sunday is spent in doing something of social value (R. 77). Thus, again, an orthodox Jewish shopkeeper need not keep his shop open on Sunday (R. 77-78).

Dr. Hoenig recognized that contemporary environmental circumstances have led to a situation where many Jews do not and would not work on Sunday voluntarily (R. 79) and that many Jews are unaware of the historical significance of Sunday (R. 81-82). However, he insisted that compulsory restraint is obnoxious to the Jew (R. 79) and that a Jew is affected by compulsory observance of the Lord's Day (R. 80).

Elder Robert L. Odom of the General Conference of Seventh Day Adventists also was presented by appellant as an expert witness concerning Sabbath and Sunday observance. In general, his testimony (R. 83-92) paralleled Dr. Hoenig's although he exhibited a somewhat stronger sense of interference with the beliefs of his people (R. 90).

The remainder of the testimony dealt with the particular activities of the present appellant and with appellant's attempt to prove discriminatory enforcement of Pennsylvania's 1939 Sunday Law by appellee McGinley. Appellee's brief deals with this issue in two short paragraphs (pp. 41-42), stating simply that "The Record makes it clear . . ." that such discrimination occurred. On the other hand, the court below pointed out in its opinion (R. 284-285) that be-

ginning in 1957 appellee McGinley made efforts to enforce the 1939 Sunday Law against numerous retail stores, including plaintiff's. The 1959 law, of course, is not here involved since McGinley was restrained from enforcing it by court order before it took effect.

The Record tells the story. Appellant opened its store in the area of Allentown, Pennsylvania, in October, 1957 (R. 97), having chosen that locale in the belief that it could remain open on Sunday (R. 97-98) and with full intent to do so (R. 97-98) even though it was aware of the existence of the 1939 Sunday Law (R. 99). Its position was that since this law was not being enforced to its knowledge, it could open on Sunday without interference (R. 99).

Appellant's employees, subsequent to its opening, were arrested by McGinley (R. 130) who was confronted with a situation of spreading defiance of the law by retail stores (R. 131). Arrests were made at other stores as well (R. 129-130). The appellant continued to remain open on Sundays (R. 131) although most other establishments closed (R. 132). McGinley continued to make arrests of appellant's employees for approximately one year (R. 112) until the present action was begun (R. 113).

On the other hand, McGinley freely admitted that industrial enterprises were open to a degree on Sunday (R. 133-134) and that recreational and communications activities were conducted (R. 134, 165). These continued without interference (R. 134-135).

Appellant also introduced testimony on this phase of the case which, it alleged, showed that McGinley had been improperly induced to enforce the law against appellant by a competitor. Two points were

advanced: (1) that this competitor paid some private legal fees to McGinley and (2) that McGinley profited from a real estate transaction involving this competitor (R. 156-160). McGinley freely discussed these matters, also (R. 135-136, 137-141).

Following this final hearing and the usual submissions (R. 258-273), briefs and argument, the District Court dismissed appellant's complaint (R. 298-299). This appeal followed (R. 300-302).

SUMMARY OF ARGUMENT

By prohibiting Congress and the states from enacting any law respecting an establishment of religion, the First and Fourteenth Amendments to the Federal Constitution provide a rule of law designed to further one of our fundamental democratic institutions. While disagreement over the original intent and meaning of this clause has been pronounced, this Court has read the clause broadly and has refused to read it simply as a barrier against creation of an actual state religion. Nevertheless, the Court has also indicated that government and religion are not enemies and that the state may accommodate its institutions to religous observance. In this respect the Court has applied a rule of reason to its broad interpretation of the establishment clause and has not implied that every official manifestation of religious belief and observance—of which there are a multitude—in our society must be rooted out.

Thus, we find evidence of religion's influence both in federal and state laws, laws which have existed for years without being considered violative of the Constitution. The Court has referred to them in its opinions and cannot be said to be unaware of them. The continued vitality of these examples of religious feeling confirm the above conclusion that reason must govern the application of the establishment clause. At the very least, those practices which are either simply trivial or are in themselves aids to the free exercise of religion should be sustained and the con-

stitutional prohibition applied to eliminate only those laws which restrict the free exercise of religion by making actual worship more difficult or which lend state authority or financial aid directly to the cause of religion.

Sunday laws have a long history. They have existed in Pennsylvania since the founding by William Penn in 1682. Yet, Pennsylvania has never supported an established church, unlike most of the original thirteen colonies. The contrary is the case. Pennsylvania was founded as a haven for religious freedom, and its tolerance of Sunday laws can only be understood in this context. These laws were enacted plainly to permit Pennsylvania's citizens to enjoy better the freedom they found in that state. It would be incongruous to hold these laws to be an establishment of religion when the very life of the state was devoted to an exactly opposite principle, a principle which has found direct expression in the Commonwealth's basic charter of government; for since at least 1790 Pennsylvania's Constitutions have barred state interference with matters of conscience.

Moreover, Sunday laws have long been sustained, even by this Court, as laws regulatory of civil matters and not as religious laws at all. Pennsylvania's courts, too, have pointed out that the legislature may act to safeguard the health of the people by requiring a day of rest and relaxation away from one's usual daily labor. That the day usually chosen coincides with the day most persons observe as a day of religious devotion is hardly reason to interfere with the legislative choice even though alternatives exist. Each alternative itself bears many defects, defects

which in some cases appear much more deleterious to the existence and beneficial interplay of beliefs and practices so vital to our democracy.

Any attack upon the classification of prohibited activity contained in the Sunday laws faces a heavy burden of proof, a burden rendered doubly difficult here by the presence of a rational basis for enactment of Pennsylvania's 1959 statute. The District Court agreed that this basis existed and refused to interfere. This Court itself has held that the legislature may act against an evil found to exist even if others remain untouched, that the only bar of the Equal Protection clause is to the invidious discrimination, a bar not crossed here. Similarly, the greater penalties of the 1959 law stem from the reasonable need to deter violations of law without terrorizing potential violators from their right to test the validity of the law. Appellant has not even made an argument on this issue.

Appellant's argument with respect to its allegation of arbitrary and unequal enforcement of law, directed at appellee McGinley, is also largely unexplained by it. This phase of the case is no longer a proper point of discussion anyway for McGinley's term of office expired on January 4, 1960. As against him personally this suit for an injunction has abated, and no statute or rule of court permits it to continue despite appellant's attempt to keep him as a party. Appellant has disclaimed any fear of unequal enforcement from appellee Joseph, who succeeded McGinley; so an injunction based upon this allegation cannot properly be granted against either appellee. On this point, then, the Court is faced with nothing but a request for an advisory opinion after the event.

Even upon the merits of this argument, no finding of discrimination is justified. McGinley enforced the Sunday law of 1939 as best he could in an atmosphere of spreading violations until restrained from further enforcement by the courts. He did not achieve one hundred per cent enforcement, but what remained untouched did not result from any purposeful and arbitrary conduct. Nor are appellant's insinuations that one of its competitors improperly induced McGinley to act against appellant entitled to any credence. They are conjured up from a few instances of business and professional dealings between McGinley and the competitor, instances wholly open, wholly permissible and wholly proper in every respect.

Finally, the District Court's determination that it need not and should not pass upon the 1939 statute in view of the passage of the 1959 law was a perfectly reasonable decision in light of the probable supersession of the former by the latter where they both applied and, primarily, in light of the District Court's explicit finding that appellant was under no jeopardy from or even threat of enforcement of the earlier act. The court below acted with proper and laudable restraint and discretion in this decision.

ARGUMENT

I. THE PENNSYLVANIA SUNDAY LAWS ARE NOT LAWS RESPECTING AN ESTABLISHMENT OF RELIGION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Establishment Clause Does Not and Has Never Been Interpreted or Appled To Extirpate All Recognition of Religious Faith From Our Laws and Practices

Any discussion of Sunday laws in the year 1960 raises an historical specter of frightening proportions Essentially, the problem is this: although Sunday laws have been a part of the life of this nation from the earliest Colonial times, the historical documents usually referred to in order to ascertain the thoughts and intentions of the framers of our Constitutional provisions are utterly devoid of reference to such laws. The importance of history in the present context cannot be overstated, for it seems wholly reasonable to conclude that such laws, familiar prior to 1789 and enduring ever since that time, somehow failed to impress themselves upon thoughtful minds as laws weakening the separation of church and state.

It is agreed, of course, that only the Federal Government was originally affected by the prohibition against establishment contained in the First Amend-

ment. It is also undisputed that the passage of the Fourteenth Amendment caused this restriction to become applicable to the states and that this application was not clearly defined until this Court's decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). There has been much dispute, however, as to the meaning of the "establishment" clause, a meaning which must be based in history and explained similarly under both the First and Fourteenth Amendments in a way consistent with history. The problem has been well stated by Alexander Bickel:

> "For only a society that strives to attain truth through reason is fit to enjoy freedom of speech. Such a freedom bestowed by judges who rest it on a historical hypothesis suspected of being (or known to be) erroneous carries the fault of a profound inner contradiction and is a very uncertain blessing. We require to know, as accurately as may be, whence we come, and to be aware that it is our own reasoned will, not some idealized ancestral compulsion, that moves us forward."[1]

No less a need governs when religious establishment is the issue.

The story of the mutations of the First Amendment, as it wound its way through the First Congress, is a familiar one. Madison initially introduced the presently pertinent clause in the following form:

> "... The civil rights of none shall be abridged on account of religious belief or worship, nor

[1] Bickel, *Book Review, The New Republic*, July 18, 1960, p. 15.

> shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed" I *Annals of Congress* 451.

Over two months later the provision was reported from committee:

> ". . . no religion shall be established by law, nor shall the equal rights of conscience be infringed." I *Annals of Congress* 757.

In addressing himself to this language, Madison said he thought it meant that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[2]

Mr. Livermore, however, succeeded in broadening the amendment to the following:

> "Congress shall make no laws touching religion, or infringing the rights of conscience." I *Annals of Congress* 759

But once again, on motion by Ames, the wording was altered:

> "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." I *Annals of Congress* 796

From this the Conference Committee derived the final form of the Amendment's language:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

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[2] I *Annals of Congress* 758-9.

Obviously, the meaning of both "establishment" and "religion" are critical to any understanding of this clause. Superficially, it would appear that the provision was meant to guard against the creation of and support by Congress of a national church. Historically, the reference to "establishment" was a familiar one; the colonies were founded largely to escape "the Establishment", the Church of England. If this be so, then it is clear that the First Amendment was designed not to strike down every manifestation of religion in law but only to prevent a church or sect from being unduly exalted. This position has received scholarly support.[3]

However, his Court has apparently rejected this reading of the clause. It seems clear that the opinion in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, expressly refused to narrow the sweeping language of the prior decision in *Everson v. Board of Education*, 330 U.S. 1, which included, in Justice Rutledge's opinion, an historical exegesis imparting broad meaning to the "establishment" clause. The result, too, has found a scholar's approval.[4]

If we are not disposed, then, to reopen and reargue the original meaning of this clause, what remains unanswered? First, the three great decisions of recent times—*Everson*, *McCollum* and *Zorich*—cannot be ignored. Second, the prevalance of a multitude of religious manifestations in our public lives are too obvious to escape attention and must be harmonized with our constitutional doctrine.

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[3] Corwin, *The Supreme Court As National School Board*, 14 Law & Contemp. Prob. 3 (1949).

[4] Pfeffer, *Church and State: Something Less Than Separation*, 19 U. Chi. L. Rev. 1 (1951).

Everson v. Board of Education, 330 U.S. 1, brought to the Court a challenge to a state law allowing the expenditure of public funds for transportation of children to parochial schools. While the Court found no infringement of the establishment clause, it laid down a sweeping restriction on governmental aid to religion. Regarding the pre-1789 history of the American colonies, the Court found in Virginia's refusal to renew a tax levy for support of the established church and its subsequent passage of the Bill for Religious Liberty a clearly appropriate analogy to the First Amendment, particularly because of Madison's passionate participation in both legislative struggles. Paradoxically, it should be noted that the Bill for Religious Liberty contained a preamble which pronounced religious liberty to be based upon "God's plan"—an unabashedly religious sentiment upon which it seems hardly appropriate to base an opinion in 1947 that these early enactments were designed to protect irreligion and anti-religious sentiment as well as freedom to worship without state interference.

Be this as it may, the entire Court agreed with the analysis of principle and apparently subscribed to the heart of the opinion:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be pun-

> ished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations, or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state' . . . " 330 U.S. 1, 15-16.

A majority of the Court found that these words did not bar aid to everyone on a non-preferential basis. Justice Rutledge, writing for four dissenters, felt that it did and stated that the only surviving threat to separation of church and state lay in use of the taxing power to support religion.[3] Sunday laws, obviously, either lay far from his mind or simply did not seem to infringe the constitutional prohibition.

In discussing the determination by the New Jersey Legislature that a public purpose was served by the aid in question, the Court uttered some significant words:

> "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." 330 U.S. 1, 6.

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[3] 330 U.S. 1, 44.

This language, as well as the present case, is strangely foreshadowed by the words, also, of Justice Frankfurter, dissenting in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624:

> "That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion to the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority." 319 U.S. 624, 662.

Released time practices in the public school's concerned the Court in both *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, and *Zorach v. Clauson*, 343 U.S. 306. In the former religious instruction was offered in the public schools during the school day. This use of the state's compulsory education machinery was found to be too directly in aid of religion and violative of the establishment clause. On the other hand, the actual release from the school property of children who wanted religious instruction was found to be sufficiently different from Illinois' practice to permit the Court to uphold New York's law in the *Zorach* case.

These two cases indicate rather pointedly that the establishment question must necessarily be one of degree. Otherwise, the state would be sterilized in its attitude toward the religious sentiments of the people. Even Justice Frankfurter, who dissented in *Zorach*

pointed out in his concurring opinion in *McCollum* that not all released time programs may be struck down by a blanket ruling, that to the extent

> "'. . . some are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern . . .'" 333 U.S. 203, 225.

It is this approach that Justice Douglas, speaking for the majority in *Zorach*, outlined:

> "The First Amendment, however, does not say that in every and all respects there should be a separation of Church and State. . . . Otherwise, the state and religion would be aliens to each other—hostile, suspicious and even unfriendly. . . . A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court'." 343 U.S. 306, 312-313.

> "We are a religious people whose institutions presupposes a Supreme Being . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. . . . It [the government] may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." 343 U.S. 306, 313-314.

The difficulty of extracting from these three opinions an easy answer to the Sunday law issue is comparable to the problem of deriving some relevant and applicable conclusion from the words of the founding fathers. Appellees submit that the establishment clause cannot be applied like disinfectant to prevent or give relief from each and every eruption, that while it may have been meant to do more than guard against a literal establishment of a church, it does not compel the abolition of every sign of devotion in public matters. Appellees believe that the establishment clause should most properly serve to eliminate from our lives those laws which tend either to restrict the free exercise of religion by placing non-preferred groups or individuals at a disadvantage in their actual freedom to worship or not to worship or to lend state authority or funds directly to further the cause of a sect, a religion or all religion.

Thus, aid in transporting all pupils to school neither restricts the right to worship or refrain therefrom nor aids religion to the exclusion of the non-religious belief. On the other hand, religious instruction in the schools during school hours lends state authority directly to the cause of religion, a factor not present where the child leaves the school and is free to attend elsewhere a class in religious instruction or to do something secular in nature.

Under this approach those manifestations of religion, legally sanctioned, which appear so often in the fabric of our society but do not inhibit one actually from following his personal desires and which do not directly promote religious observance may be constitutionally tolerated. A converse corollary to this

proposition would leave intact those laws which tend to further the free exercise of religion. Thus, federal laws providing for the compensation of the chaplain of the United States Senate[6] for the appointment of chaplains at the United States Military Academy[7] and the Air Force Academy[8] and for chaplains in the armed forces[9] infringe no constitutional requirements. Similarly, we tolerate federal laws exempting ministers of religion from military service[10] and religious foundations from income taxation.[11] In none of these things do we espy any particular threat to our religious freedoms, yet all display a certain degree of religious deference by government. In various ways all may be sustained either as laws which further the free exercise of religion or as laws evidencing practices so traditionally woven into our social fabric that any invidiously religious effect has long since disappeared or simply as laws whose religious overtones are too trivial to invite invalidation.

One final illustration of the pervasive nature of these matters in our laws is seen in the Federal Constitution itself. Art. I, § 7, states:

> "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him . . . it shall become law unless Congress has adjourned."

Is this an invalid recognition of religion? Or is it simply a recogntion that even in a country guarantee-

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[6] 69 Stat. 499 (1955), 2 U.S.C. §61d.
[7] 70A Stat. 239 (1956), 10 U.S.C. §4337.
[8] 70A Stat. 562 (1956), 10 U.S.C. §9337.
[9] 70A Stat. 167, 322 (1956), 10 U.S.C. §§3064, 5576.
[10] 62 Stat. 609 (1948), 50 App. U.S.C. §456(g).
[11] Internal Revenue Code of 1954, §501(c)(3).

ing religious freedom, the practical consequences of having a majority adhere to one faith entail certain concomitant social, political and economic factors which cannot be avoided?

Sunday laws in the modern world certainly do not prevent one from attending the church of his choice or staying away from any church. They leave all persons free to worship or refrain therefrom, according to the individual choice. They represent no imparting of state authority or funds to aid religious observance. At most, they accommodate the social fabric to the free exercise of religion in a way most calculated to aid the majority of our citizens without compelling that majority to take any pro-religious action.[12] It may be that at the time of the Council of Laodicea Sunday observance represented a matter of religious dogma;[13] It may be that Puritan New England enforced Sunday religious observance strictly;[14] but it is equally true that in Pennsylvania today Sunday has lost any officially religious denotation it may once have had.[15]

Even one of the outstanding adherents of church-state separation has recognized that matters which advance freedom of conscience or which are too trivial

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[12] Sunday laws do not require church attendance or any special devotion.

[13] See Dr. Hoenig's testimony (R. 75).

[14] For a scholarly treatment of religion in colonial New England, see Miller, *The New England Mind—The 17th Century* (2d Ed. 1954) and *The New England Mind—From Colony to Province* (1953).

[15] It is even doubtful that Pennsylvania's Sunday laws ever were designed to "establish" religion: see Brief, I. B. infra.

to invoke judicial condemnation may be tolerated even if they appear to reflect official religion.[16] This same writer's indication that Madison did consider such practices as appointment of chaplains and tax exemptions as encroachments on the Constitution[17] reveals, also, that even Madison's views are not ipso facto determinative of the present issue; for it hardly seems possible that these examples should have endured for so long and not invite legal opposition.

In this context of the application of a general constitutional principle, not clearly defined in the light of a multitude of traditional practices, in the light of the lack of any threat to individual religious freedom and in the light of our general institutional recognition of a Supreme Being, to a centuries old statute which compels no worship or observance, can we now state that Pennsylvania has enacted a law respecting an establishment of religion? Appellees submit that we cannot and should not.

[16] Pfeffer, *Church and State · Something Less Than Separation*, 19 U. Chi. L. Rev. 1, 22-23.

[17] Id. at 23-24.

B. Pennsylvania's Sunday Laws Have Never Reflected Either in Intent or Operation an Establishment of Religion

At the time of the American Revolution nine of the thirteen colonies sheltered an established church: the Congregational, in Massachusetts, Connecticut and New Hampshire; the Anglican in Maryland, Virginia, North Carolina, South Carolina, Georgia and New York.[18] Rhode Island, New Jersey, Pennsylvania and Delaware, on the other hand, supported no church. By 1789 Maryland, New York and the South had disestablished; but New England establishment continued for several decades.[19]

Pennsylvania itself was founded to promote religious freedom; and as Sweet points out, no other colony was as attractive a haven for the various sects or gave them as much latitude in working out their diverse views.[20] The early history of the Commonwealth hardly reveals the Puritan approach; and while the early laws reflect a positive Christian orientation, it must be remembered that there were few Jews in Pennsylvania at its founding.[21]

[18] Sweet, W. W., *The Story of Religion in America* (1939) 274.

[19] Id. at 275.

[20] Id. at 145-171.

[21] See Dunaway, *History of Pennsylvania* (2d Ed. 1948) 295 and Wolf & Whitman, *The History of the Jews of Philadelphia from Colonial Times to the Age of Jackson* 12-15.

For example, the first Frame of the Government drafted by William Penn and promulgated on April 25, 1682,[22] contained simply the following:

> "Twenty-second. That as often as any day of the month, mentioned in any article of this charter, shall fall upon the first day of the week, commonly called the Lord's Day, the business appointed for that day, shall be deferred till next day, unless in case of emergency."

This was soon followed by several provisions of law agreed upon in England on May 5, 1682:

> "Thirty-fifth. That all persons living in this province, who confess and acknowledge the one almighty and eternal God, to be the creator, upholder and ruler of the world, and that hold themselves obliged in concience [sic] to live peaceably and justly in civil society, shall in no ways be molested or prejudiced for their religious persuasion or practice in matters of faith or worship, nor shall they be compelled at any time to frequent or maintain any religious worship, place or ministry whatever.
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> "Thirty-six. That according to the good example of primitive Christians, and for the ease of the creation, every first day of the week, called the Lord's Day, people shall abstain from their common daily labour, that they may the better dispose themselves to worship God according to their understandings."

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[22] The standard sources of the earliest Pennsylvania laws are the *Duke of York's Book of Laws*, 1676-1682, *and the Charter and Laws of the Province of Pennsylvania*, 1682-1700 (1879).

While an atheist might well feel mistreated by these laws today, the problem did not arise at the time; and it is obvious that these enactments provided a basic pattern for the free exercise of religion. Required Sunday abstinence from daily labor reflected only a furtherance of the State's desire to provide freedom of conscience for its residents, not an enforced observance of a religious ceremony.

The Great Law of December 7, 1682, expanded these two concepts:

> "Chap. I • • • That no person, now, or at any time hereafter, living in this Province, who shall confess and acknowledge one Almighty God to be the Creator, Upholder and Ruler of the world, and who professes, him, or herself obliged in Conscience to live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his, or her Conscientious persuasion or practice. Nor shall hee or shee at any time be compelled to frequent or Maintain anie religious worship, place or Ministry whatever, Contrary to his, or her mind, but shall freely and fully enjoy his, or her, Christian Liberty in that respect, without any Interruption or reflection. And if any person shall abuse or deride any other, for his or her different persuasion and practice in matters of religion, such person shall be lookt upon as a Disturber of the peace, and be punished accordingly.
>
> "But to the end That looseness, irreligion and Atheism may not Creep in under pretense of Conscience in this Province, *Be It further Enacted by the Authority aforesaid*, That, according to the

example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's Day, People shall abstain from their usual and common toil and labor, That whether Masters, Parents, Children, or Servants, they may the better dispose themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best suite their respective persuasions."

Noteworthy throughout these enactments is the injunction that no person shall be compelled to frequent or maintain any religious worship, place or ministry. A more careful and complete disassociation from an establishment of religion can hardly be imagined, and it would seem to be a major contradiction to proceed from this to conclude that the Sunday abstinence provisions themselves respected an establishment.

The first significant change in the Pennsylvania Sunday Law came with the Act of 1705-6 which became law after October 24, 1709:

"Be it enacted, that according to the example of the primitive Christians, and for the ease of the Creation, every First day of the week, commonly called Sunday, all people shall abstain from toil and labor; that whether, masters, parents, children, servants or others, they may the better dispose themselves to read and hear the Holy Scriptures of Truth at home, and frequent such meetings of religious worship abroad as may best suit their respective persuasions. And that no tradesman, artificer, workman, laborer or other person whatsoever shall do or exercise any wordly business or work of their ordinary callings on the

First day or any part thereof (works of necessity and charity only excepted) upon pain that every person so offending shall, for every offense, forfeit the sum of twenty shillings, to the use of the poor of the place where the offense was committed; being thereof convicted before any justice (either upon his view, confession of the party, or proof of one or more witnesses), and the said justice shall give a warrant, under his hand and seal, to the next constable where such offense shall be committed, to levy the said forfeiture or penalty by distress and sale of the offender's goods and chattels, rendering to the said offender the overplus of the money raised thereby.

"Provided always, That nothing in this act contained shall extend to prohibit the dressing of victuals in families, cook-shops or victualling-houses, or to water-men landing their passengers on the First day of the week; nor to butchers their killing and selling of meat, or fishermen from selling fish on the morning of the First day of the week, in the Fourth, Fifth and Sixth months, called June, July and August, nor to the crying of milk before nine of the clock in the morning, or after five in the afternoon.

"Provided, also, That no person shall be impeached, presented or molested for any offense before mentioned in this act, unless he or they be prosecuted for the same within ten days after the offense committed.

"And be it further enacted, That no person or persons on the First day of the week shall serve, execute or cause to be served or executed, any

writ, precept, warrant, order, judgment or decree (except in the case of treason, felony or breach of the peace), but that the serving of any such writ, precept, warrant, order, judgment or decree shall be void to all intents and purposes whatsoever; and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, precept, warrant, order, judgment or decree at all.

"And be it further enacted, That all persons who are found drinking and tippling in ale houses, taverns or other public-house or place on the First day of the week, commonly called Sunday, or any part thereof, shall, for every offense, forfeit and pay one shilling and six Pence to any constable that shall demand the same, to the use of the poor. And all constables are hereby empowered, and by virtue of their office required to search public-houses and places suspected to entertain such tipplers, and them when found quietly to disperse; but in case of refusal, to bring the persons so refusing before the next justice of the peace, who may commit such offenders to the stocks, or bind them to their good behavior, as to him shall seem requisite. And the keepers of such ale-houses, tavern or other public-house or place as shall countenance or tolerate any such practices, being convicted thereof by the view of a single magistrate, his own confession, or the proof of one or more credible witnesses, shall, for every offense, forfeit and pay ten shillings, to be recovered as and for the uses aforesaid.

"Provided always, That nothing in this act be construed to prevent victualling-houses or other public-house or place from supplying the necessary occasion of travelers, inmates, lodgers or others on the First day of the week with victuals and drink in moderation, for refreshment only; of which necessary occasion for refreshment, as also moderation, the magistrate before whom complaint is made shall be judge, any law, usage or custom in this province to the contrary notwithstanding."[23]

This lengthy act remained intact until passage of the Act of March 30, 1779.

[§1] "Be it enacted, That if any person shall do any kind of work of his or her ordinary calling or follow or do any worldly employment or business whatsoever on the Lord's Day commonly called Sunday (works of necessity and mercy only excepted) or shall use or practice any game, play, sport or diversion whatsoever on the said day and be convicted thereof before any justice of the peace each and every person so offending shall for every such offense be fined the sum of three pounds to be levied by distress and sale of the offender's goods and chattels by warrant under the hand and seal of the said justice; or in case the offender shall have none he or she shall be committed to the common goal or workhouse of the county there to remain without bail or mainprise . . . the term of ten days.

[Sec. 2] "Provided always, That nothing in this act contained shall be construed to prohibit

[23] 2 Stats. at Large of Pa. Ch. CXIX, pp. 175-7.

the dressing of victuals in private families; bake houses or house of [public] entertainment, or to watermen landing their passengers on the Lord's day, commonly called Sunday, nor the selling of milk before nine of the clock in the morning, or after five in the afternoon of the said day."[24]

Currency depreciation led to a new act on Sept. 25, 1786.

"Be it enacted, That from and after the first day of August next, if any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, (work of necessity and charity only excepted) or shall use or practice any unlawful game, hunting, shooting, sport or diversion whatsoever on the same day and be convicted thereof, every such person so offending shall for every such offense forfeit and pay the sum of thirty shillings to be levied by distress or in case he or she shall refuse or neglect to pay the sum or goods and chattels cannot be found whereof to levy the same by distress he or she shall suffer six days imprisonment in the house of correction of the proper county.

"Provided always, That nothing herein this act contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, or in lodging houses, inns and other houses of entertainment for the use of sojourners, travelers or strangers, or to hinder watermen from landing their passengers, or stage coaches or stage wagons from carrying travelers (hav-

[24] 9 Stats. at Large of Pa. 333.

ing the consent of a justice of the peace upon extraordinary occasions) on the Lord's day [commonly] called Sunday nor [to] the delivery of milk or other necessaries of life before nine of the clock in the forenoon nor after five of the clock in the afternoon of the same day."[25]

The Act of 1786, soon due to expire by its own terms; the General Assembly passed the Act of April 22, 1794.[26] This act was little changed from its predecessor (the fine of thirty shillings changed to four dollars and the exception for ferrymen added), and it survived until codified as part of the Act of June 24, 1939, Pamphlet Laws 872, §699.4, one of the statutes attacked here by appellants.

This lengthy recital has been engaged in, first, to show the history of Pennsylvania's basic Sunday Law (and the lack of history of the 1959 act); second, to indicate the context of non-establishment and religious freedom in which it grew; and third, to refute appellant's quote (appellant's brief, p. 21) from *Commonwealth v. Pedano*, 33 D. & C. 551, as to the source of the Act of 1794 (the lower Pennsylvania court seemed unduly impressed by one pressure group's activities rather than 112 years of history and the imminent expiration of the Act of 1786).

Appellant's overexertion in this respect is illustrated further by its reference (appellant's brief, p. 22) to legisaltive protection of the Christian Sabbath in 1794 being necessarily derived from the legislator's oath contained in the Constitution of 1776;

[25] 12 Stats. at Large of Pa. 313, 314.
[26] 3 Sm. L. 178, 81.

First, the Constitution of 1776 was no longer in force in 1794, having been replaced by the Constitution of 1790. Second, the Constitution of 1790 contained an oath provision for legislators as follows, Article VIII):

> "Members of the general assembly, and all officers, executive and judicial, shall be bound, by oath or affirmation, to support the constitution of this commonwealth, and to perform the duties of their respective offices with fidelity."

Third, the Constitution of 1790 (Article IX) contained a broad and sweeping declaration of rights, §3 of which reads:

> "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship."

This clause has existed, substantially in verbatim form, ever since its initial promulgation in the Constitution of 1790.

It appears as §3 of Article IX in Pennsylvania's Constitution of 1838 and as §3 of Article I in Pennsylvania's present basic document, the Constitution of 1873.

A further example of appellant's failure to meet this issue realistically is seen in its truncated ref-

erence to Christianity being part of the common law of Pennsylvania (appellant's brief, p. 22). The case, most often cited, is *Updegraph v. The Commonwealth*, 11 S. & R. 394 (1824), wherein the Pennsylvania Supreme Court considered an appeal from a conviction for blasphemy (and, incidentally, reversed the conviction). Here is the full passage from which the quoted words are taken:

> "Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania; Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, William Penn; not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes and spiritual courts; but Christianity with liberty of conscience to all men." 11 S. & R. 394, 399

Even this Court has expressly recognized that Pennsylvania's courts do not assert that Christianity is established as the legal religion. Justice Story stated it forthrightly in *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 126 (1844):

> "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that state, as found in its constitution of government. The constitution of 1790 * * * expressly declares [quoting Art. IX, §3, supra]. Language more comprehensive for the complete protection of ev-

ery variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in Updegraff v. The Commonwealth, 11 Serg. & R. (Pa.) 394." 43 U. S. (2 How.) 126, 198-9.

Without exception, this non doctrinaire approach to religious sentiment represents the outer limits to which Pennsylvania has ever gone. All early justifications of Sunday laws go no further in their religious recognition than to uphold these laws as an added feature of the guarantee of free exercise of religion. Both early and late, Sunday laws have been supported, also, as being essentially civil law. (discussed below, part C) Because appellees do not believe that this demarcation between the religious and the civil is as clearcut as some Sunday law supporters would have it, they have discussed the establishment of religion question as well. Nevertheless, appellees submit that Pennsylvania's extended history of religious liberty, its firm undeviating adherence to non-establishment and its devotion to tolerance and free expression of belief compel the conclusion that its Sunday laws can not be and are not laws respecting an establishment of religion.

C. Sunday Laws Serve a Valid and Useful Civil Purpose Consistent with a State's Legislative Power to Protect the Health, Safety, Welfare and Morals of Its Citizens

All of the discussion thus far has proceeded in recognition of the apparent religious origin of Sunday laws and of their place under the constitutional limitations upon the establishment of religion. However, Sunday laws have also been accepted and upheld as civil laws providing a day of rest for the individual. Before this understanding received clear expression from the courts of Pennsylvania, it was foreshadowed by the decision in *Commonwealth v. Wolf*, 3 S. & R. 48 (1817), where conviction of a Philadelphia Jew for working on Sunday was sustained against the assertion that the Sunday law of 1794 offended Article IX, §3, of the Pennsylvania Constitution of 1790. The court held that a law designed to remind people of their religious duties and to provide a day of rest for the worker was a valid one.[27]

Specht v. The Commonwealth, 8 Pa. 312 (1848), directly met the contention of a member of the Seventh Day Baptists that the Act of 1794 violated Article IX, §3, of the State Constitution. While reiterating the breadth of religious freedom given to the citizens of Pennsylvania, the court pointed out that gen-

[27] *Wolf and Whiteman*, op. cit., supra, n. 21, at p. 234, relate the amusing story of another Jew, Joseph S. Cohen, then Prothonotary of the Supreme Court of Pennsylvania, who, when found at work one Sunday, replied to the objector, "Sunday is *dies non ju.*"

eral laws passed for the welfare of all persons had to be obeyed, that the legislature has power to fix a day of rest and that Sunday was reasonably chosen since such a choice accorded with the day most people would themselves choose as a day of rest. The Act of 1794, the court continued, is a civil regulation, commanding all to refrain from labor.

No succeeding appellate court decision in Pennsylvania has deviated fundamentally from this modern view of Sunday legislation. The civil purpose of these laws is well established despite their religious origin and despite Sunday's exalted stature within the Christian theology. It is this fact, together with the lack of any feature bringing Sunday laws within the constitutional prohibitions regarding religious establishment, which the two lower court judges in Pennsylvania failed to recognize in their recent opinions (appellant's brief, pp. 41a-48a) and which make those opinions isolated examples in the jurisprudence of Pennsylvania.

This Court itself has recognized the civil nature of Sunday laws. First, in *Soon Hing v. Crowley*, 113 U.S. 703, it said:

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor." 113 U.S. 703, 710

Then in *Hennington v. Georgia*, 163 U.S. 299, the Court stated:

"In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purpose of rest from ordinary labor. The fundamental law of the State committed these matters to the determination of the legislature. If the law making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and State, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature." 163 U.S. 299, 304

Appellant's contention (appellant's brief, p. 29) that these opinions are irrelevant because of the absorption of the guarantees of the First Amendment by the Fourteenth misses the point. This expansion of constitutional restrictions upon the states would still not affect a properly enacted civil regulation; and both *Soon Hing* and *Hennington* explicitly characterized Sunday laws as civil regulations. No reason exists now to change this conclusion in 1960, and a similar characterization obviously answers the religious objection despite its greater field of operation.

Contemporary expressions of opinion by this Court are lacking in the sense that no full scale opinion has been handed down. However, numerous times in the past decade the court has rendered per curiam dismissals of appeals. These dismissals were, of course, dispositions on the merits of the questions presented.[28] The decisions noted are *Friedman v. New York*, 341 U.S. 907 (in which a direct challenge to the older cases was made); *State v. Towery*, 347 U.S. 925; *Gundaker Central Motors v. Gassert*, 354 U.S. 933; *Grochowiak v. Pennsylvania*, 358 U.S. 47; *Kidd v. Ohio* and *Ullner v. Ohio*, 358 U.S. 131. Virtually every conceivable question raised by the attacks on Sunday laws were raised in these appeals, yet none resulted in a holding that Sunday laws are invalid.

Thus, there exists a long history of treatment of Sunday laws by the courts as civil regulations. The power of the legislature to require a day free from the daily ordinary labor of a person seems unquestionable, and appellees do not understand appellant's

[28] *Ohio ex rel. Eaton v. Price*, 360 U.S. 246.

to assert that such may not be done. Moreover, the distinction between refraining from one's usual labor and performing such labor is the issue, not the distinction between absolute rest and labor. The performance of recreational activities seems equally, if not more, conducive to the refreshment of body and mind as does pure rest.

Arguments advanced by amicus curiae and suggested by appellants that other laws effectively provide the need for rest required by the worker do not negate the effectiveness and validity of Sunday laws. The legislative power is charged initially with working out the basic problems of the social welfare of the citizenry, and that it may act multifariously hardly seems sufficient reason to void its enactments or to require a court to say one act is valid and another void. Statutory recognition of the basic forty hour week[29] has certainly lessened the possibility of overwork, yet can it be said that a further reduction to thirty-five hours for certain workers would be unnecessary and invalid?

Similarly, amicus curiae has suggested that satisfactory alternatives exist whereby day-of-rest statutes may operate without depriving a person of his liberty to choose his own day. It is undoubtedly true that a state can enact legislation requiring one day of refraining from one's usual labor without specifying the day, but this power to act is far from a constitutionally compelled result. When it is asserted that this alternative must be chosen because it involves less interference with constitutionally granted liberties, there is presented simply a question-beg-

[29] 52 Stat. 1063 (1938), 29 U.S.C. §207.

ging argument, an argument which assumes that Sunday laws infringe constitutional rights. *Dean Milk Co. v. Madison*, 340 U.S. 349, cited in support of this assertion, is a case in which an otherwise proper milk regulation was found to erect economic barriers violative of the Commerce Clause where an alternative regulatory procedure would have provided the same protection without such violation. It was the violation of the Commerce Clause which invoked the "satisfactory alternative" doctrine, not the existence of the alternative alone which required it to be followed.

An effective analysis of the real difficulties with this alternative suggestion has been carefully made in a note in 73 Harv. L. Rev. 729 (1960). To summarize the objections there made to the one-day-of-rest-in-seven statute: (1) enforcement would be rendered more difficult; (2) the efficacy of the one day in which an atmosphere of general relaxation prevails would be diluted and its salutary effects diminished; and (3) opportunities for interpersonal contact would be lessened. Is a court to say that the legislature has erred in determining that these values, enhanced by specifying Sunday as the day of rest, are not valid ones as opposed to the value of allowing one to choose his own day of rest?

The second suggested alternative—that of exempting from Sunday laws persons who observe another day—is equally subject to criticism. Whatever feelings of difference exist in a non-Sunday observer would not be diminished because the majority of persons would continue to refrain from their ordinary labor on Sunday. Non-business contacts between

Sunday and non-Sunday observers would become more difficult. The general beneficial effects of having one day of relative quiet and relaxation would be diminished. Determination of the sincerity of an individual's belief in another day as a day of rest could pose a difficult problem. Prejudice against non-Sunday believers might be accentuated, particularly among those Sunday observers in commercial competition with those persons who remain open on Sunday; and interfaith contacts would be rendered more difficult.

None of these arguments are recited to prove that the possible alternatives to Sunday laws are themselves invalid. Appellees believe that all are valid exercises of the state's police power but that none represents a so-called "alternative" which perforce must be utilized[30] because another infringes constitutional liberties. The state's interest in providing a time for relaxation, for withdrawal from daily labor, is a real one; how the state effectuates its policy in this regard is primarily the function of its legislature, not the courts even if the latter would choose another method. Resort to Sunday laws directly produces benefits and effects values equally, if not more, compelling than the other methods; and Pennsylvania's approach cannot be said to be destructive of these benefits and values.

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[30] The Record (100) shows rather plainly that this appellant actually has no interest in any alternative which would affect its full-scale operation seven days a week.

II. THE CLASSIFICATION OF PROHIBITED ACTIVITIES AND THE FINES CONTAINED IN THE PENNSYLVANIA ACT OF AUGUST 10, 1959, PAMPHLET LAWS 630, DO NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Pennsylvania Statute Does Not Discriminate Invidiously in Violation of Appellant's Right to the Equal Protection of the Laws

Appellees assume that this phase of appellant's attack is limited to the specific limitations contained in the 1959 Act and does not extend to the general exceptions for works of necessity and charity, etc. in the 1939 Act. Both appellant's statement of questions (appellant's brief, p. 6) and its discussion (appellant's brief, pp. 35-41) support this assumption; and the older exceptions seem reasonable on their face.

The 1959 Act prohibits the sale at retail of certain specified items. Appellant's attack takes two approaches: (1) that only retail sales are restricted and (2) that only specified commodities are singled out for action: Then, by setting forth a list of horrors comparing what can and cannot be sold, appellant rests its case.

We suggest that the problem is more complex than this. First, this Court long ago explained its position with regard to the classification of objects in a

regulatory statute. In *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-9, these rules were established:

a. A state may classify as long as its action is not purely arbitrary.

b. A reasonable classification is not invalid because in practice it results in some inequality.

c. If any facts would sustain a classification, the existence of such facts at the time of the enactment must be assumed.

d. One who attacks a classification bears the burden of showing that it is unreasonable and arbitrary.

This statement of principle has never been altered. Has appellant met its burden?

The Pennsylvania statute operates equally upon all persons similar situated. This is an act directed against the sale of specified commodities, not against the operation of particular kinds of business where the same object may be sold by both a prohibited and a non-prohibited enterprise, thus giving the latter a possibly unwarranted competitive advantage. By aiming at commodities this objection is avoided and the principle of equality sustained.[31]

Prima facie, it does not seem arbitrary for the statute to limit its restriction in the manner seen here. The Pennsylvania General Assembly may well have concluded that all sales at wholesale and retail sales of other commodities did not pose a problem requiring action by it. The very careful delineation

[31] A collection of state court decisions on this aspect of Sunday laws may be found at 57 A. L. R. 2d 959.

of goods in the statute suggests that the legislature knew exactly what evils existed and were to be remedied. Its approach reflects a zeal to reach only as far as it felt necessary and not to impose blanket prohibitions where they were not needed. No answer to this is found in appellant's brief.

Second, appellant is faced with a specific finding by the District Court that the "circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action" (R. 284). The District Court went on to explain that the 1939 Sunday law was generally obeyed by retailers in Lehigh County until the very recent opening of large suburban businesses like appellant's, an event which initiated violations and threatened more. The four dollar fine, according to testimony at the legislative hearings on the proposed act, was too small to deter violations. Finally, the District Court found the commodities covered in the 1959 Act were the principal commodities sold by the new suburban establishments. All of these findings suggest that not only can we assume a state of facts making passage of this legislation reasonable, but we can also discern the presence of actual facts justifying the classification found in the act.

Third, this Court has indicated its reluctance to overturn legislative classification, no matter how narrow. In *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, the Court was confronted with an attack by local opticians upon a state statute regulating visual care. One objection made by the opticians was that the act applied to them but not to sellers of ready-to-wear glasses. The Court answered:

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. Texas, 310 U.S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Semler v. Oregon State Dental Examiners, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. A. F. of L. v. American Sash & Door Co., 335 U.S. 538. The prohibition of the Equal Protection clause goes no further than the invidious discrimination." 348 U.S. 483, 489.

Previously, in *Hughes v. Superior Court of California*, 339 U.S. 460, the Court upheld a contempt conviction for violation of an injunction prohibiting picketing to compel the hiring of Negroes in these words:

"A State is not required to exercise its intervention on the basis of abstract reasoning. The Constitution commands neither logical symmetry nor exhaustion of a principle. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. Chicago, 228 U.S. 61. A State may 'direct its law against what it deems the evil, as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not

> differ in kind from those that are allowed.' Central Lumber Co. v. South Dakota, 226 U.S. 157." 339 U.S. 460, 468.

Considering, then, that no business is placed in a preferred position by this statute, that the court below expressly found that a rational basis existed for the legislative action and that this Court requires one who asserts the invalidity of a classification to show an invidious discrimination, can we conclude that the Act of August 10, 1959, violates the equal protection clause? On all but three counts appellants believe we cannot.

B. The Pennsylvania Statute Does Not Violate the Due Process Clause of the Fourteenth Amendment

1. The Act is reasonably calculated to meet an evil subject to legislative action.

The reach of the due process clause in the area of classifications in statutes adds little to the protection granted by the equal protection clause: it simply provides an additional weapon to strike down patently arbitrary legislation. Here, we have already seen that the purpose of the act itself and the classification contained therein were directed at known evils: large-scale violations of law in the field of retail selling, especially of the commodities listed in the act. It is hardly possible to state that this regulatory statute deprives appellant of due process of law under these circumstances.

This Court has emphasized the burden which must be met by one seeking to prove that a state statute regulating business violates due process. In *Williamson v. Lee Optical of Oklahoma, Inc.*, supra, another phase of the attack on the statute there involved centered upon its unnecessary qualities. This Court said:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particu' r school of thought." 348 U.S. 483, 488.

Appellees do not ask the Court to indicate agreement with the legislative means here adopted to prevent significant intrusions upon a traditional valid and well-defined state policy; they ask only that the Court recognize the propriety of these means to effect a solution to the problem and the validity of the goal sought.

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2. The fines provided by the Act are not oppressive and discriminatory.

Both in its jurisdictional statement (p. 6) and its brief (p. 6) appellant states one of the questions presented as that arising from a possible violation of the Fourteenth Amendment by "oppressive and discriminatory" fines. Not a word on this question can be found in either paper book submitted by appellant, and it seems likely that appellant has abandoned it. However, appellees do not believe that any serious objection can be made, anyway.

The Act of 1959 provides for a fine not exceeding one hundred dollars ($100) for the first offense of making a sale or offering to sell at retail on Sunday and for a fine not exceeding two hundred dollars ($200) or thirty days imprisonment in default of payment for a second or subsequent offense committed within a year of conviction for a first offense.

With regard to state police regulations and penalties thereunder this Court has stated:

> "* * * there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. * * * And the extent of the

penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control.[32]

Where utility rates are involved and the penalty for violation is so severe that the utility is intimidated from testing the validity of the rates by court proceedings, this Court has said that the penalty (and the statute, therefore) violate the Constitution.[33] Whether this result follows from application of the equal protection clause or the due process clause, there is no reason to extend it to a situation like the present one. We are not confronted with a rate-making statute; nor, obviously, has appellant been intimidated from resorting to the courts. Pennsylvania should be left free to determine the appropriate penalties for violations of its Sunday law as long as its determination is not clearly unreasonable. The fines in the Act here questioned do not violate this principle.

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[32] *Minneapolis & St. Louis R. Co. v. Emmons*, 149 U.S. 364, 367.

[33] *Ex Parte Young*, 209 U.S. 123.

III. APPELLANT IS ENTITLED TO NO RELIEF ON THE GROUND THAT APPELLEE McGINLEY'S METHOD OF ENFORCEMENT OF THE PENNSYLVANIA SUNDAY LAWS VIOLATED APPELLANT'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Termination of Appellee McGinley's Term of Office on the First Monday of January 1960 Likewise Terminated the Need for and Effect of Injunctive Relief Against McGinley Based Upon His Method of Enforcement of the State Statute

Appellee McGinley served as District Attorney of Lehigh County, Pennsylvania, from January 2, 1956, until January 4, 1960. The termination date is confirmed by the Record (303), and the former can be determined by reference to the relevant Pennsylvania statute concerning the term of a district attorney.[34] On January 8, 1960, appellant petitioned the court below to order the "substitution of [appellee] George J. Joseph . . . as an additional defendant . . ." (R. 303). As its reasons for this request appellant referred to the termination of McGinley's term of office (R. 303), the assumption of office by Joseph (R. 304) and the necessity of the substitution so that appellant could continue its action with regard to the constitution-

[34] Act of August 9, 1955, Pamphlet Laws 323, §1401; 16 Pa. Stat. Ann. §1401.

ality of the statutes (R. 304). It also stated (R. 304) that it had no reason to believe that Joseph would enforce the statutes in a discriminatory manner.

Appellee's counsel simply overlooked the technical nicety of appellant's phrasing, "substitution . . . as additional defendant," and consented to the motion. Obviously, it was proper to substitute Joseph for McGinley in order to continue the suit insofar as the alleged invalidity of the statutes is involved; and Rule 25 (d) of the Federal Rules of Civil Procedure expressly provides for a situation like this one. That Rule, however, speaks of substitution only with regard to the question of an invalid law, remaining absolutely silent on the question of invalid enforcement.

It is appellees' contention that the cause of action alleged by appellant on the issue of enforcement necessarily abated when McGinley left office.[35] Several reasons compel this conclusion. First, absent a statute or Rule 25 (d), this Court has held that actions against public officers abate upon their death or retirement.[36] Second, nothing in Rule 25 (d) speaks of retaining or substituting as a party a public officer where the issue relates only to his discriminatory enforcement of a statute, presumed valid. Third, even if that Rule could be stretched to cover this case, it requires an allegation that the invalid enforcement method will continue. This fact appellant expressly denied. Fourth, no authority anywhere exists for the appearance in a case of a "substituted additional defendant" except, possibly, where a third

[35] Cf. *Ex Parte LaPrade*, 289 U.S. 444.
[36] *Pullman Co. v. Knott*, 243 U.S. 447.

party joinder has previously occurred. Fifth, and most compelling, appellees submit, is the fact that no viable relief can possibly be given as to this aspect of the case.

Assume that the statute itself is found valid in all respects. We are then left with a claim for equitable relief based only upon discriminatory enforcement. No monetary damages are claimed by appellant against McGinley. This situation means that appellant is asking this Court to pass upon its right to obtain an injunction against a public official who is no longer a public official. An injunction against McGinley is meaningless since he is in no position to enforce the statute; an injunction against Joseph is equally meaningless since he never did enforce the statute prior to this suit and since appellant has explicitly denied any suggestion that Joseph would enforce discriminatorily. The Court would be operating in a vacuum.

Appellant's only suggestion in support of the continuation of this phase of the appeal is its reference to pending criminal prosecutions (appellant's brief, p. 42). There are several answers to this contention. First, there is nothing in the record raising a question concerning these prosecutions. Second, any valid defense which any person may have in these prosecutions may easily be raised in the criminal proceedings themselves. Third, appellant's reference to *People v. Harris* (appellant's brief, p. 42) seems misplaced. The cited report of that case appears to summarize its holding as requiring a trial court to allow the defendant in a criminal case to introduce evidence of discriminatory enforcement as a defense to his pros-

ecution. The California court also notes that such an allegation may be made in an equitable proceeding. Both of these statements are unimpeachable; but neither has anything to do with the problem of procedure when the prosecuting attorney is no longer in office.

Appellant's position, in effect, would require this Court to render an advisory opinion. No real controversy presently exists in this suit for an injunction with regard to appellee McGinley's conduct as District Attorney of Lehigh County, and this Court should not go beyond the real questions of the case to reach a decision on a matter no longer an issue.

B. Even If the Question of Enforcement Be Considered, Appellee McGinley Did Not Enforce the Pennsylvania Sunday Laws in an Unconstitutional Manner

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Assuming, however, that the enforcement issue should be decided, there has been no violation of appellant's constitutional rights. Of course, no controversy at all can arise over the 1959 Sunday law because McGinley was restrained from enforcing it before it became effective. Appellant's allegations in this respect stem from enforcement of the 1939 law only.

The court below found as a fact that enforcement of the Sunday law in Lehigh County had been lax for some time (R. 284). It also found that McGinley, beginning in 1957, "made substantial and frequent efforts by admonition and arrest" to enforce the law against numerous retail establishments, including ap-

pellant's (R. 284-285). It decided that no basis existed in the record for predicting what enforcement would occur under the 1959 Act and that enforcement of that Act while violations under the 1939 Act went unpunished did not deny equal protection of the laws to the appellant although it might subject the district attorney to sanctions for violation of his public duty (R. 285). The lower court also indicated that failure to enforce the 1939 law against some Sunday activities while enforcing it against others created no more of a constitutional issue than the statutory classification itself (R. 285).

On all of these points except the last appellees are in agreement with the District Court. As to the last conclusion reached, appellees do feel that selective enforcement of the 1939 Act could raise a constitutional question regardless of the legislative discrimination in the statute itself. What a legislature may do should not be the criterion for determining what a district attorney may do in enforcing a law. However, simply to reach this conclusion does not solve anything, anymore than does the invocation of the phrase "selective enforcement" to describe a particular pattern of official conduct.

In this area what must be reviewed is the intent and purpose of a policy of unequal enforcement. Few constitutional doctrines are so dominated by a single case as this one, but *Yick Wo v. Hopkins*, 118 U.S. 356, remains the first and last, if not quite the only, word. The Court there summed up the vice of discrimination in enforcement in these words:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and

> administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. 356, 373-4

A later-day statement of the principle appears in *Snowden v. Hughes*, 321 U.S. 1:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf. McFarland v. American Sugar Ref. Co. 241 US 79, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, Yick Wo v. Hopkins, 118 US 356. But a discriminatory purpose is not presumed, Tarrance v. Florida, 188 US 519, there must be a showing of 'clear and intentional discrimination,' Gundling v. Chicago, 177 US 183 . . ." 321 U.S. 1, 8.

In light of these statements, what does the present case reveal? It reveals, first, that appellant entered the Allentown, Pennsylvania, market knowing that state law prohibited Sunday business activity and intending to remain open seven days a week (R. 97-99). In justification of its knowing violation of law,

it depended upon its predetermined findings that enforcement through the years had been negligible if it existed at all (R. 98-99).

On the other hand, McGinley testified that the area was generally quiet on Sunday (R. 117) although he was long aware that certain recreations, industries and corner grocery stores were open (R. 116). After he became District Attorney, this pattern continued until appellant opened its store in the fall of 1957 with considerable fanfare (R. 117); and both actual and threatened violations of the Sunday law mushroomed (R. 118). Confronted with what appeared to be an alarming and widespread defiance of law, McGinley moved to prevent an upheaval (R. 119-124). Arrests wre made not only at appellant's but also at other stores (R. 122) although no arrests took place in appellant's food, drug and restaurant area which were legally permitted to open (R. 122). Other arrests were made elsewhere (R. 123); and, subsequently, general compliance with the law, except by appellant, followed (R. 123). Undoubtedly, as the Record shows (223-249), violations occurred constantly in the smaller stores throughout the community; and McGinley, faced with the impossibility of being everywhere at once (R. 126), stated that the cooperation of all public agencies and citizens was requested (R. 126) and that his office would prosecute any appeals from aldermanic hearings (R. 125).

No question exists concerning the fact that some of the local industries maintained their plants on Sunday (R. 133), that various recreational activities were carried on (R. 134), and that newspapers were published R. 165). McGinley felt that for a number

of reasons it was doubtful whether enforcement of the Sunday law against these operations would be sustained (R. 134, 135, 141-142).

On this state of facts appellant submits one ground for its charge of discriminatory enforcement. Its second ground, ignored in its brief, but mentioned briefly in its jurisdictional statement (n.2, p.8), is that McGinley was "improperly induced to [discriminate] by Max Hess . . . appellant's principal business competitor." Appellant proves nothing in this respect. The Record shows, as McGinley freely stated, that McGinley received some legal fees from Max Hess or his store (R. 135-137) over a four year period, the total amounting to possibly $1200.00, and that McGinley took part in a real estate transaction with Mr. Hess in which he made a fee and some profit (R. 137-141, 156-161). On the other hand McGinley testified, in effect, that he told Max Hess that he would enforce the law against Hess' store as well as appellant's (R. 142).

Having received legal fees from a business man and having sold real estate to him do not amount to being bribed by that business man without some additional proof. Receiving a bribe is a crime in Pennsylvania[37] as is corrupt solicitation,[38] and both may involve the influencing of a public officer in connection with his official duties by payment of money. A district attorney in Pennsylvania is permitted to en-

[37] Act of August 9, 1955, Pamphlet Laws 323, §1405. 16 Pa. Stat. Ann. §1405; Act of June 24, 1939, Pamphlet Laws 872, §303, 18 Pa. Stat. Ann. §4303.

[38] Act of June 24, 1939, Pamphlet Laws 872, §304; 18 Pa. Stat. Ann. §4304.

gage in private practice not in actual conflict with his public duties and it is obvious that he may receive private legal fees from or engage in business with persons who have an independent interest in having these duties performed without committing a crime. Appellant's allegations in the present case require an ultra-credulous imagination to receive any support. There is good reason for this. The allegations are simply untrue.

Does the record show, therefore, an administration of a statute with an "evil eye" and with "purposeful discrimination"? Appellees submit that it does not, that McGinley pursued the most rational enforcement policy within his power and resources, that appellant's attack on Max Hess' activities is legally groundless and that its insinuations concerning McGinley in this respect are not entitled to serious consideration. On all counts no showing of unconstitutional enforcement has been made. The explanation is simple: there was none.

IV. THE DISTRICT COURT DID NOT ERR IN DETERMINING NOT TO PASS UPON THE CONSTITUTIONALITY OF THE 1939 PENNSYLVANIA SUNDAY LAW

Confronted with passage of the 1959 statute prior to final hearing and with inclusion of that statute in appellant's attack, the court below concluded that it should refrain from passing upon the 1939 Sunday Law until its application to appellant or another similar enterprise was clarified by the state courts. Several reasons were given by the District Court for this determination:

First, the court felt that insofar as the same activities are covered by both laws, the newer act superseded the 1939 statute. In this, it clearly seems to be right. Pennsylvania's "Statutory Construction Act"[39] contains two provisions supporting this view. Section 63[40] requires that a general provision in a law give way to a conflicting special provision in a later law. Section 66[41] rules that a newer law shall prevail over a conflicting older law. Also, the Pennsylvania Supreme Court has held that a specific penal provision supersedes a general one where both apply to the same prohibited act. *Commonwealth v. Brown*, 346 Pa. 192. This combination of statutory and case law, the District Court held (R. 275), at the very least made application of the 1939 Act to appel-

[39] Act of May 28, 1937, Pamphlet Laws 1019, §§1-101, 46 Pa. Stat. Ann. §§501-601.

[40] 46 Pa. Stat. Ann. §563.

[41] 46 Pa. Stat. Ann. §566.

lant an uncertain things to be best resolved by the state courts.

Second, and possibly even more compelling, the District Court found (R. 275-276) that appellant could show no present need for protection with regard to the 1939 Act. As that Court stated:

> "The evidence does not show and the court does not find any present or continuing threat to enforce against plaintiff's retail selling the . . . 1939 statute . . ." (R. 275)

What the record does show, in fact (R. 112-115), is that appellant continued to open on Sunday throughout 1958 even while the 1939 statute was being enforced against it and only proceeded to bring the present action when appellee indicated that he might institute conspiracy charges, a position from which he later withdrew (R. 9, 39). Whatever injury appellant suffered under McGinley's pattern of enforcement of the older law evidently seemed to it hardly worth the trouble of preventing. These two factors —the finding of no jeopardy to appellant from any enforcement of the 1939 Act and the lack of serious harm to it even under enforcement—both substantiate the wisdom of the District Court's action.

Appellant's reference in its brief (p. 42) to the fact that "less than a year before" the Pennsylvania state courts had held the 1939 Act applicable to appellant's employees is simply irrelevant. "Less than a year before" the decision in this case was a time at which only the 1939 Act existed, the 1959 statute having not yet been enacted. It seems, therefore, that the District Court acted with proper discretion and wisdom in concluding as it did; and appellees submit that its action should be affirmed.

CONCLUSION

For the reasons above stated, the final order of the District Court should be affirmed.

Respectfully submitted,
HARRY J. RUBIN
WALLACE C. WORTH, JR.
ANNE X. ALPERN
Counsel for Appellees

Harrisburg, Pennsylvania
November 3, 1960

FILE COPY

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 36.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, Defendant and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,
Appellees.

On Appeal From the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 et seq.

Reply Brief for Appellant.

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
HARRY A. KALISH,
LOUIS E. LEVINTHAL,
2635 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pa.,
MORRIS EFRON,
502 Turner Street,
Allentown, Pa.,
OSCAR BROWN,
1500 Bankers Securities Bldg.,
Philadelphia 7, Pa.,
Attorneys for Appellant.

DILWORTH, PAXSON, KALISH,
KOHN & DILKS,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 36.

TWO GUYS FROM HARRISON-ALLENTOWN, INC.,
Appellant,

v.

PAUL A. McGINLEY, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, DEFENDANT AND GEORGE J. JOSEPH, DISTRICT ATTORNEY, COUNTY OF LEHIGH, PENNSYLVANIA, SUBSTITUTED ADDITIONAL DEFENDANT,
Appellees.

ON APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE COURT SITTING IN THE EASTERN DISTRICT OF PENNSYLVANIA PURSUANT TO 28 U. S. C. § 2281 ET SEQ.

REPLY BRIEF FOR APPELLANT.

1. Appellees proceed upon the fundamental misconception that the Federal Constitution invalidates only two types of religious laws, those (a) which create a religious establishment in the sense of the Anglican Church in England, that is a *state church*, or (b) which forbid a citizen to practice his own religion.

Appellees are aware of the *McCollum* case, but having made polite obeisance to it, they then ignore the tests of constitutionality there prescribed * and seek to explain away the religious aspect of the Pennsylvania Sunday Blue Laws by measuring them solely against a standard equivalent to Anglican establishmentarianism.

Compulsory abstention from work is just as much a form of religious observance as kneeling or removing one's hat. *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 632-3, Appellant's Brief, pages 17-18. The Pennsylvania Sunday Blue Laws, in the language of *McCollum*, "aid one religion," the Christian; they "prefer one religion," the conventional Christian faith, over others such as the Seventh Day Adventist, the Jewish or the Moslem; they do and are intended to "influence a person to go to . . . church"; they pierce the "wall of separation between church and state." Appellees cast no doubt on any of these facts.

2. Appellees' Brief, indeed, ignores the pivotal findings of *fact* by the court below, that the Pennsylvania Sunday Blue Laws are religious in origin, purpose and effect. Nowhere do appellees allude to these findings, or show why they are not binding (See F. R. C. P. Rule No. 52(a)). On the contrary, from appellees' own Brief, when it refers to the testimony (as at pages 8-9), or traces the continuous development from the earliest Pennsylvania Sunday Blue Law to the most recent (as at pages 28-36), it is clear that these findings are supported by the evidence, and indeed are

* "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. . . . In the words of Jefferson the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210-11 (1948).

the only findings that could have been made upon the record here. With these facts found, the statutes in question are necessarily unconstitutional.

Respectfully submitted,

HAROLD E. KOHN,
WILLIAM T. COLEMAN, JR.,
LOUIS E. LEVINTHAL,
HARRY A. KALISH,
MORRIS EFRON,
OSCAR BROWN,
Attorneys for Appellant.

DILWORTH, PAXSON, KALISH, KOHN & DILKS,
Of Counsel.

November 30, 1960.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1960.

Two Guys From Harrison-Allentown, Inc., Appellant, v. Paul A. McGinley, District Attorney, County of Lehigh, Pennsylvania, et al. | On Appeal From the United States District Court for the Eastern District of Pennsylvania.

[May 29, 1961.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The primary questions presented in this case are whether a Pennsylvania statute enacted in 1959[1] which makes unlawful the Sunday retail sale of certain commodities, imposing a fine of up to one hundred dollars for

[1] 18 Purdon's Pa. Stat. Ann. § 4699.10 provides:

"Selling certain personal property on Sunday

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense.

"Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter."

the first offense, is violative of the constitutional guarantees of equal protection of the laws and religious freedom.

This case is essentially the same as *McGowan* v. *Maryland*, — U. S. —, decided today. The major differences between the Pennsylvania and Maryland Sunday Closing Laws concern the specific provisions for exemptions from the general proscription of Sunday sales and activities. The religiously oriented backgrounds of both the Maryland and Pennsylvania statutes are strikingly similar although the Pennsylvania colony never had an established church while one did exist for a time in Maryland. While the pronouncements of the Supreme Court of Pennsylvania indicate that it disclaimed a religious purpose for Sunday closing at an earlier date than did the Maryland Court of Appeals, later Pennsylvania decisions returned to religious purpose language while the Maryland opinions consistently rested on secular bases. On the other hand, the legislative history of the most recent Pennsylvania Sunday provisions is more striking than that of the Maryland laws in providing support for the position that temporal considerations preoccupied the State Legislature.

Appellant is a corporation which operates a large discount department store located on a highway in Lehigh County, Pennsylvania. For some time prior to the instant litigation, McGinley, the County District Attorney, prosecuted a number of appellant's employees for violating 18 Purdon's Pa. Stat. Ann. § 4699.4, a section of the Pennsylvania Penal Code of 1939.[2] This statute,

[2] § 4699.4. "Worldly employment or business on Sunday

"Whoever does or performs any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary pro-

with certain exceptions, generally forbids all worldly employment, business and sports on Sunday. Works of charity and necessity are excepted, as is the delivery of milk and necessaries before 9 a. m. and after 5 p. m. Two recent amendments also except wholesome recreation (defined as golf, tennis, boating, swimming, bowling, basketball, picnicking, shooting at inanimate targets and similar healthful or recreational exercises and activities) and work in connection with the rendering of service by a public utility. Violations of this section carry a penalty of four dollars. Appellant then sought an injunction in the court below to restrain the District Attorney from enforcing this statute against it, alleging that the statute was unconstitutional for the reasons stated above and because the District Attorney was discriminating against appellant in enforcing the law. Accordingly, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. Before trial, the Pennsylvania Legislature enacted the 1959 provision and appellant amended its complaint to include it, alleging that the District Attorney was threatening to enforce it against appellant.

Although appellant challenged only the statutory sections mentioned above, in order to properly consider appellant's contentions, the whole body of Pennsylvania

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ceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.

"Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment for the use of sojourners, travelers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day."

Sunday Laws must be examined.[3] Among the other activities prohibited on Sunday by these Pennsylvania statutes are selling of motor vehicles and trailers, operation of pool rooms or billiard rooms, conduct of boxing or wrestling matches, harness racing, pawnbrokering, contests for retrieving dogs, catching of fish in the Delaware River by use of a net, and extension education in public school buildings. The Sunday exhibition of motion pictures is permitted only after 2 p. m., and then only if the voters in each municipality approve; however, religious motion pictures may be shown by churches at any time providing they are shown within church property and no admission price is charged. Baseball, football and polo receive similar treatment except the permitted hours are between 1 p. m. and 7 p. m. Public concerts, of music of high order though not necessarily sacred, may only be performed after noon.

The off-the-premises sale of alcoholic beverages on Sunday is disallowed; but private clubs may sell alcoholic beverages to their members on Sunday, as may hotel restaurants between 1 p. m. and 10 p. m. in first and second-class Pennsylvania cities if the voters in those cities so choose. Municipalities and third-class Pennsylvania cities have statutory authority to restrain desecrations of the Sabbath day; one statutory section simply empowers various judicial officers to punish persons who profane the Lord's day. Barbering and beauty culture

[3] These laws, in their entirety, may be found in 4 Purdon's Pa. Stat. Ann. §§ 1, 30.202, 59–66, 81–91; 121–127, 151–157, 181–185, 307 (c); 18 Purdon's Pa. Stat. Ann. §§ 632, 633, 4651, 4699.4, 4699.9, 4699.10; 24 Purdon's Pa. Stat. Ann. § 19–1903; 30 Purdon's Pa. Stat. Ann. §§ 118, 138, 153, 265, 273; 34 Purdon's Pa. Stat. Ann. §§ 1311.702, 1311.719, 1311.721, 1311.731, 1311.1205; 43 Purdon's Pa. Stat. Ann. § 361; 47 Purdon's Pa. Stat. Ann. §§ 3–304, 4–406, 4–492; 51 Purdon's Pa. Stat. Ann. § 623; 53 Purdon's Pa. Stat. Ann. §§ 23130, 37403 (24); 61 Purdon's Stat. Ann. §§ 184, 195; 63 Purdon's Pa. Stat. Ann. §§ 281–28, 519, 559.

work on Sunday subjects the actor to license revocation. Male prisoners may not perform manual labor on Sunday and bakery employees are not permitted to commence working on Sunday before 6 p. m.

The statutes generally proscribe hunting and shooting on Sunday but make an exception for the removal of fur-bearing animals from traps. Sunday fishing from public lands or in public waters is permitted, but not on private property without the consent of the owner. Also banned is the training of dogs except with the permission of the owner upon whose land the activity is undertaken.

The court below, although finding that McGinley threatened to enforce the 1959 Act against appellant's employees, denied appellant the injunctive relief sought, dismissing appellant's constitutional objections that the 1959 statute was a law respecting an establishment of religion, that the statute preferred one religion over others and that the classifications drawn by the statute were violative of equal protection of the law. The three-judge court declined to pass on the constitutionality of the 1939 statute because it found that, since the 1959 statute was now in effect, there was no imminent threat to appellant of being prosecuted under the 1939 enactment. The court also felt it its duty to refrain from passing upon the 1939 statute because it believed that there was a substantial unsettled question of Pennsylvania law as to whether the 1939 Act was superseded by the 1959 Act so far as the specific commodities covered by the latter statute. Regarding appellant's contention that McGinley was enforcing the 1939 statute discriminatorily, the court held that since McGinley had recently made substantial efforts to compel observance of the statute by numerous retail stores, since the relief appellants sought was wholly prospective and since McGinley's term of office as District Attorney was expiring within a month of the decision, there was no basis for

finding that there would be future discriminatory enforcement of the 1939 statute. 179 F. Supp. 944. On appeal brought under 28 U. S. C. § 1253, we noted probable jurisdiction. 362 U. S. 960.

I.

Before reaching the primary questions presented, several ancillary matters must be considered. First, appellant contends that McGinley discriminated against it in enforcing the laws. Recognizing that a mootness problem exists because Lehigh County now has a new District Attorney,[1] appellant contends that there are still pending prosecutions against its employees initiated as the result of the alleged discriminatory action. Since appellant's employees may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination, we do not believe that the court below was incorrect in refusing to exercise its injunctive powers at that time.

Furthermore, we do not believe that the three-judge District Court abused its discretion in declining to pass on the constitutionality of the 1939 statute for the reasons stated. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496. The court below made clear that if appellant's employees were threatened with prosecution under the 1939 Act, and if the Pennsylvania courts decided that the 1939 Act still applies to appellant, that would be time enough to consider that statute's validity. Similarly, we do not believe that the court abused its equity power in refusing to continue the preliminary injunction barring enforcement of the 1939 statute against appellant since there was no imminent threat of prosecution.

[1] The new District Attorney was "substituted as an additional defendant" in the court below on appellant's motion, which stated that appellant "has no reason to believe and, therefore, does not aver that [the new District Attorney] will discriminatorily enforce [the] laws as did his predecessor. . . ."

II.

Appellant urges that the 1959 enactment is contrary to the Fourteenth Amendment's mandate of equal protection of the laws because, without rational basis, the statute singles out only twenty specified commodities, the Sunday sale of which is penalized by a fine of up to one hundred dollars for the first offense and, for subsequent offenses committed within one year, a fine of up to two hundred dollars or, in default thereof, imprisonment not to exceed thirty days; and also because the statute's proscription extends only to retail sales. Appellant argues that to forbid the Sunday sale of only some items while permitting the sale of many others and to exclude only retailers from Sunday operation while exempting wholesalers, service dealers, factories, and those engaged in the other excepted activities defeats the State's alleged interest of providing a day of rest and tranquillity for all.[5]

The standards for evaluating these contentions have been set out in *McGowan* v. *Maryland*, — U. S. —, —; we need not restate them here. First, appellant's argument overlooks the fact that the 1939 Pennsylvania statute prohibits *all* worldly employment or business, with narrowly drawn exceptions; the 1959 enactment now before us simply supplements the prior regulation. The existing system then imposes a greater penalty for the Sunday sale of some items at retail than it imposes for other Sunday retail sales and for the other Sunday activities that appellant seems to have assumed are not forbidden at all. Of course, as to works of charity, necessity or recreation, the State Legislature could find that the interests of its citizens are best served by permitting these Sunday activities; that their interference with the absolute tranquillity of the day is justified by

[5] Concomitantly, appellant states the statute violates due process for these same reasons.

their requirement and desirability. *McGowan* v. *Maryland, supra*, at p. ——.

As to the rationality of imposing a heavier penalty for the Sunday sale of the selected commodities, the court below found:

> "that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that of the plaintiff initiated and triggered new and rather large scale violations, and threats of others . . . [and] that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute." 179 F. Supp., at 952.[6]

It was within the power of the legislature to have concluded that these businesses were particularly disrupting the intended atmosphere of the day because of the great volume of motor traffic attracted,[7] the danger

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[6] Commenting on prior English Sunday legislation, a Member of Parliament stated:

"The penalty is a fine of 5s., and nobody will suggest that that is effective in any way. It simply means the payment of 5s., with a little expense added to that, in order to keep open on Sundays, and it seems to me that the Statute of 1677, applied to modern conditions, is nothing short of ridiculous." 308 Parliamentary Debates, Commons, 2167.

[7] A Pennsylvania legislator stated:

"It was several months ago, over a year ago, that a business from New Jersey moved into the aforementioned Whitehall Township of

of their competitors also opening on Sunday[8] and their large number of employees. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical*, 348 U. S. 483, 489.[9]

III.

Appellant contends that the Pennsylvania Sunday Closing Law is one respecting an establishment of religion because it commemorates the Resurrection, obliges everyone to honor this basic doctrine of the major Christian denominations by abstaining from work and encourages

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Lehigh County. It was known as the 'Two Guys from Harrison.' They started operating on Sunday. It was a novelty. The people came from Northampton, Bucks, Monroe, Pike, Schuylkill and all the surrounding counties, so much so that they jammed traffic on the highways of the Seventh Street Pike in Allentown and Whitehall Township. However, the people came and they did business. There were other enterprises along the same route which were open on Sunday and doing business." 36 Pennsylvania Legislative Journal 1143.

[8] This problem was recognized when the English legislation was being considered. A Member of Parliament stated:

"So far, happily, the great combine and chain stores have not entered on Sunday trading, but they are business enterprises and it is not impossible that they may find themselves compelled by economic considerations and pressure of local circumstances to open on Sunday, because Parliament takes no action to control and regulate Sunday business in retail shops. If that development should take place, we shall find our shopping centres on a Sunday no different in any way from the bustle, noise and glamour of the week-day trade." 308 Parliamentary Debates, Commons, 2166.

[9] The basic English Sunday statute, 29 Charles II, c. 7 (1677), imposed differing fines for different proscribed activities.

Christian religious worship. Appellant also alleges that the statute discriminates against certain religions. For the same reasons stated in *McGowan* v. *Maryland*, *supra*, at pp. —, we hold that appellant has standing to raise only the first contention.[10]

To prove its argument, appellant relies on the language of the present laws in question, on the prior history of this legislation and on various statements of the Pennsylvania courts in interpreting the statutes. We agree that an inquiry into these matters is relevant. *McGowan* v. *Maryland*, *supra*, at pp. —.

The court below found that the connection between religion and the original Pennsylvania Sunday closing statutes was obvious and indisputable. This is clearly demonstrated by the first Pennsylvania Sunday law, enacted in 1682.[11] There were re-enactments several years later, and again in 1700, which once more stated the pur-

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[10] MR. JUSTICE BLACK is of the opinion that appellant also has standing to raise the second contention and that the claim is without merit. See *McGowan* v. *Maryland*. — U. S. —, —, n. 6.

[11] "Whereas the glory of Almighty God and the good of Mankind, is the reason & end of government, and therefore, government in itself is a venerable Ordinance of God. And forasmuch as it is principally desired and intended by the Proprietary and Governor and the freemen of the Province of Pennsylvania and territories thereunto belonging, to make and establish such Laws as shall best preserve true Christian and Civil Liberty, in opposition to all Unchristian, Licentious, and unjust practices, (Whereby God may have his due, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.

"*Be it therefore Enacted by William Penn, Proprietary and Governour, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid, in Assembly met, and by the Authority of the same*, That these following Chapters and

poses of preventing "Looseness, Irreligion, and Atheism," and of better permitting on Sunday the reading of the scriptures at home or the frequenting of meetings of religious worship. *Id.*, at 192. 2 Statutes at Large of Pennsylvania 3–4. In 1705, some changes appeared. The preamble of the statute remained religious [12] and the stated purposes of bible reading and religious worship continued. However, some of the exceptions still present in the 1939 statute first appeared, but a specific ban on the drinking of alcoholic beverages in public houses was enacted. *Id.*, at 175–177. The most apparent forerunner of the 1939 statute was passed in 1779. The preamble stated only that the purpose was "for the due observation of the Lord's day." 9 Statutes at Large of Pennsylvania 333. No mention was made of bible reading or religious worship and the specific Sunday prohibition concerning

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Paragraphs shall be the Laws of Pennsylvania and the territories thereof.

"Chap. I. Aimighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind. . . .

"But to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, *Be It further Enacted by the Authority aforesaid*, That, according to the example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's day, People shall abstain from their usual and common toil and labour, That whether Masters, Parents, Children, or Servants, they may the better dispose themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best sute their respective persuasions." Charter and Laws of the Province of Pennsylvania 1682–1700, 107–108.

[12] It stated:

"To the end that all people within this province may with the greater freedom devote themselves to religious and pious exercises." *Id.*, at p. 175.

alcoholic beverages was omitted. By 1786, the preamble completely disappeared, 12 Statutes at Large of Pennsylvania 314. See 15 Statutes at Large of Pennsylvania 110 for the final colonial enactment in 1794.

The present statutory sections still contain some traces of the early religious influence. The 1939 statute refers to Sunday as "the Lord's day"; but it is included in the general section entitled, "Offenses Against Public Policy, Economy and Health." Title 18 Purdon's Pa. Stat. Ann. § 4651 uses the term "Sabbath Day" and refers to the other days of the week as "secular days." But almost every other statutory section simply uses the word, "Sunday," and contains no language with religious connotation. It would seem that those traces that have remained are simply the result of legislative oversight in failing to remove them. Section 4651 was re-enacted in 1959 and happened to retain the religious language; many other statutory sections, passed both before and after this date, omit it. Certain political subdivisions are authorized to restrain "desecrations of the Sabbath day," and there is a jurisdictional section authorizing the punishment of persons who "profane the Lord's day." But many of the activities historically considered to be profane—*e. g.*, the consumption of alcoholic beverages—are now no longer totally prohibited. There is a general immunity for religious motion pictures and some of the recently exempted activities are permitted only during Sunday afternoons.

On the other hand, we find that the 1939 statute was recently amended to permit all healthful and recreational exercises and activities on Sunday. This is not consistent with aiding church attendance; in fact, it might be deemed inconsistent. And the statutory section, § 4699.10, the constitutionality of which is immediately before us, was promoted principally by the representa-

tives of labor and business interests.[13] Those Pennsylvania legislators who favored the bill specifically disavowed any religious purpose for its enactment but stated instead that economics required its passage.[14]

As early as 1848, the Pennsylvania Supreme Court vociferously disclaimed that the purpose of Sunday closing was religious:

> "All agree that to the well-being of society, periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed, may enjoy a respite from labour at the same time. They may be established

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[13] 36 Pennsylvania Legislative Journal 1139, 2553, 2682–2683.

[14] For example:

"As I read this bill, I find nothing in it which is of a religious nature. The bill is prompted by the thousands of letters that we have all received in the Senate of Pennsylvania, asking us to do something for the men and women who work in the department stores. These people are not asking to go to church; they are asking for a day of rest.

"I do not find anyone complaining about the Act passed at the last Session concerning the automobile business.

"This is a bill which has been crystalized by, I think, a very great organized labor section in our Commonwealth, the American Federation of Labor. They are in favor of it. They are heading up a group of people who have no particular voice to speak for them. I believe it is the obligation of the Senate of Pennsylvania to vote for this bill in order to give some recognition to the men and women who work and who are compelled to work on Sundays, whether they like it or whether they do not like it.

"This is not a bill. It is rather an indictment of our civilization which makes this kind of legislation possible and necessary. It is too bad that business will not permit its employees to have a day of rest. It is too bad that we must legislate morals, as we may be doing in this bill." *Id.*, at 1139. See also *id.* at 1137–1140, 2564–2565, 2682–2685.

by common consent, or, as is conceded, the legislative power of the state may, without impropriety, interfere to fix the time of their stated return and enforce obedience to the direction. When this happens, some one day must be selected, and it has been said the round of the week presents none which, being preferred, might not be regarded as favouring some one of the numerous religious sects into which mankind are divided. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labour, it is not surprising that that day should have received the legislative sanction: and as it is also devoted to religious observances, we are prepared to estimate the reason why the statute should speak of it as the Lord's day, and denominate the infraction of its legalized rest, a profanation. *Yet this does not change the character of the enactment. It is still, essentially, but a civil regulation made for the government of man as a member of society*, and obedience to it may properly be enforced by penal sanctions. *Specht* v. *Commonwealth*, 8 Pa. 312, 323. (Emphasis added.) [15]

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[15] The Pennsylvania court also stated:

"The error of the plaintiff's position is that it confounds the reason of the prohibition with its actual effect, and thus mistakes the mere restraint of physical exertion for the fetters that clog the freedom of mind and conscience. But were this otherwise, the plaintiff's argument is inapplicable to the act of 1794. The conclusions drawn from some of its language are as inexpressive of its practical operation, as of the principal intent of its makers. The phraseology used may indicate a conviction of the holy character of the first day of the week, but as this simple expression of an abstract opinion, which all other men are at liberty to adopt or reject, carries with it no obligation beyond the influence attendant upon the expression itself, it cannot be said a primary object of the act was, authoritatively, to

Concededly, there were a number of cases [9] decided after *Specht* which used language strongly supporting appellant's position. But, these cases, the last of which was decided more than thirty years ago, did not squarely decide a constitutional contention. More persuasively, in the only recent appellate case dealing with the constitutionality of the 1939 statute, the Pennsylvania Superior Court affirmed an opinion which specifically relied on the language and reasoning of *Specht*. *Commonwealth* v. *Bauder*, 188 Pa. Super. 424, 145 A. 2d 915, affirming 14 Pa. D. & C. 2d 571.

Having carefully examined the entirety of the present legislation, the relevant judicial characterizations and, particularly, the legislative history leading to the passage of the 1959 Act immediately before us, we hold that

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assert the supremacy of Sunday as of Divine appointment. Had such been the intent, irrespective of its statutory character as a day of rest from secular employment, its framers would not have stopped short with a bare interdiction of labour and worldly amusements. Following the example offered by older states and communities, they would have commanded the performance of religious rites, or at least, some express recognition of the day as the true Sabbath. Such a requisition, we agree with the plaintiff in error, would be a palpable interference with the rights of conscience. But nothing like this is exacted. On the contrary, every one is left at full liberty to shape his own convictions, and practically to assert them to the extent of a free exercise of his religious views. In this, as in other respects, the conscience of each is left uncontrolled by legal coercion, to pursue its own inquiries and to adopt its own conclusions. In this aspect of the statute there is, therefore, nothing in derogation of the constitutional inhibition." *Id.*, at 324.

[9] *See Johnston* v. *Commonwealth*, 22 Pa. 102, 111 (1853); *Commonwealth* v. *Nesbit*, 34 Pa. 398, 405–409 (1859); *Society for the Visitation of the Sick* v. *Commonwealth ex rel. Meyer*, 52 Pa. 125, 135 (1866); *Sparhawk* v. *Union Passenger R. Co.*, 54 Pa. 401, 408–409, 423 (1867); *Commonwealth* v. *American Baseball Club*, 290 Pa. 136, 141, 143, 138 A. 497, 499 (1927).

neither the statute's purpose nor its effect is religious. See *McGowan* v. *Maryland, supra*, at pp. —, —. Moreover, for the same reasons stated in *McGowan* v. *Maryland, supra*, at pp. —, —, we reject appellant's contention that the State has other means at its disposal to accomplish its secular purpose that would not even remotely or incidentally give state aid to religion.

Accordingly, the decision is

Affirmed.